No. 88-1866

Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GEORGE McNABB,
Petitioner

vs.

DR. LAURO CAVAZOS, SECRETARY OF EDUCATIO
and THE U.S. DEPARTMENT OF EDUCATION

and

ARKANSAS DEPARTMENT OF HUMAN SERVICES,
DIVISION OF SERVICES FOR THE BLIND,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MELVA HARMON KOZINSKY
904 West Second Street
P.O. Box 2657
Little Rock, Arkansas 72203
(501) 372-1133

Attorney for Petitioner

Of Counsel:

LAVEY, HARMON & BURNETT
904 West Second Street
P.O. Box 2657
Little Rock, AR 72203
(501) 372-1133

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTION PRESENTED

1. Whether an arbitration panel convened by the Secretary of the United States Department of Education pursuant to the Randolph-Sheppard Act, 20 U.S.C. §107 *et. seq.*, to arbitrate a dispute between a blind vending stand operator and the Arkansas Division of Services for the Blind, is precluded by the Eleventh Amendment to the United States Constitution from issuing an award against the State for compensatory damages to the blind vendor. Subsumed within the larger question are four subsidiary questions:

(a) Whether the Randolph-Sheppard Act authorizes the arbitration panel to award compensatory damages against the State to be paid to the blind vendor.

(b) Whether an arbitration panel is a non judicial forum which is not restricted by the Eleventh Amendment's grant to the states of immunity from suit in federal court.

(c) If the Eleventh Amendment is applicable to the decision of an arbitration panel, whether Congress abrogated the state's Eleventh Amendment immunity.

(d) Whether the State of Arkansas waived any Eleventh Amendment immunity to an award of compensatory damages when it made application with the U.S. Department of Education to administer the Randolph-Sheppard Act and agreed to final and binding arbitration of blind vendor grievances.

LIST OF PARTIES

Petitioner, George McNabb, the appellee in the Eighth Circuit, is a blind person licensed under the Randolph-Sheppard Act, 20 U.S.C. §107 *et. seq.*, to operate a vending stand in Arkansas. Respondent, United States Department of Education, is the administrator of the Randolph-Sheppard Act on the national level; and respondent, Arkansas Department of Human Services, Division of Services for the Blind, administers the Act on the state level.

TABLE OF CONTENTS

		Page
I.	Question Presented for Review	i
II.	List of Parties	ii
III.	Table of Contents	iii
IV.	Table of Authorities	v
V.	Opinions Below	1
VI.	Jurisdiction	2
VII.	Constitutional Provisions and Statutes	2
VIII.	Statement of the Case	3
	A. The Randolph-Sheppard Act	3
	B. The Grievance and Arbitration Proceedings	5
	C. The District Court Opinion	6
	D. The Court of Appeals Opinion	7
IX.	Argument	8
	A. The Decision Below Directly Conflicts with a Decision of the Third Circuit Court of Appeals; Supreme Court Rule 17.1(a)	8
	B. The Court Below Has Decided an Important Question of Federal Low Which Has Not Been, but Should Be, Settled by this Court; Supreme Court Rule 17.1(c)	10

C. The Decision Below Also Conflicts in Principle with Supreme Court Cases Regarding The Status of Arbitration and The Remedial Power of Arbitrators; Supreme Court Rule 17.1(c) 11

X. Conclusion 14

Appendix:

A - Opinion of Eighth Circuit Court of Appeals A-1

B - Opinion of the District Court A-14

C - Opinion of the Arbitration Panel A-20

D - Judgment of the Eighth Circuit Court of Appeals A-39

E - Denial of Petition for Rehearing A-41

F - Randolph-Sheppard Act A-42

TABLE OF AUTHORITIES

Page

Cases:

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985) 12

Committee of Blind Vendors v. District of Columbia, (Case 88-0142) 695 F.Supp. 1234 (D.D.C. 1988) ... 10

Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed. 2d 675, (1986) 12

Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932) 12

Delaware Department of Health and Social Services, Division for the Visually Impaired v. United States Department of Education, 772 F.2d 1123, (3rd Cir. 1985) 6,8

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974) 12

Georgia Department of Human Resources v. Bennett, No. 88-8120 (11th Cir.) 10

IUE v. Peerless Pressed Metal Corporation, 489 F.2d 768 (1st Cir. 1973) 13

Lodge 12, Machinists v. Cameron Iron Works, 292 F.2d 112 (5th Cir. 1961), cert. denied 368 U.S. 926 (1961) 13

Lynchburg Foundry Co. v. Steelworkers Local 2556, 404 F.2d 259 (4th Cir. 1968) 13

McDonald v. City of West Branch, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed. 2d 302 (1984) 12

McNabb v. United States Department of Education and Arkansas Department of Human Services, Division of Services for the Blind, 862 F.2d 681 (8th Cir. 1988) 1

Mitsubishi Motors Corp. v. Solar Chrysler Plymouth, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed. 2d 444 (1985) 13

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983) 13

Northern Pipeline Construction Co. v. Marathon Pipeline Company, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982) 12

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) (Pennhurst I) 10,12

Pennhurst State Schools v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed. 2d 67, (1984) (Pennhurst II) 11

Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960) ... 13

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960) ... 13

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed. 2d 409, (1985) 12

Welch v. State Department of Highways and Public Transportation, 483 U.S. ____, 107 S.Ct. 2941, 97 L.Ed. 2d 391 (1987) 9,11

Constitutional Provisions:

Article III 11,12

Eleventh Amendment ..... *passim*

Statutes:

Act 393 of the Acts of Arkansas, 1975 4

Administrative Procedure Act, 5 U.S.C. §701 *et seq.* 4,12

Randolph Sheppard Act, 20 U.S.C. §107 *et. seq.* ..... *passim*

Rehabilitation Act of 1973, 29 U.S.C. §720 *et seq* . 3

Rehabilitation Act of Arkansas, *Ark. Code Ann.* 20-79-201 *et seq* 4

U.S. Arbitration Act, 9 U.S.C. §1 8

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 7

28 U.S.C. §1331 6

Other Sources:

Rule 19(a) Fed.R.Civ.P. 6

Senate Report 93-937 issued on June 17, 1974, to accompany 25581, 93rd Congress, 2d Session, p. 13, and Pub. L. 93-516, §201 11

Supreme Court Rules ..... *passim*

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GEORGE McNABB,
Petitioner

vs.

DR. LAURO CAVAZOS, SECRETARY OF EDUCATIO
and THE U.S. DEPARTMENT OF EDUCATION

and

ARKANSAS DEPARTMENT OF HUMAN SERVICES,
DIVISION OF SERVICES FOR THE BLIND,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, George McNabb, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 5, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which is reported at 862 F.2d 681 (8th Cir. 1988), is reprinted at Appendix A, pp. A-1-13 *infra*. The opi-

nion of the United States District Court for the Eastern District of Arkansas appears at Appendix B, pp. A-14-19 *infra*. The opinion of the arbitration panel is Appendix C, pp. 20-38 *infra*.

JURISDICTION

A divided panel of the court of appeals entered a judgment on December 5, 1988, with three separate opinions reversing in part a judgment of the district court in petitioner's favor (Appendix D *infra*). On February 17, 1989, the court of appeals denied a timely petition for rehearing by the panel and also for rehearing en banc (Appendix E *infra*). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Randolph-Sheppard Act provides in section 107d-1 regarding grievances of blind licensees:

> (a) **Hearing and arbitration**
>
> Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary [of Education] who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the

> decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter. 20 U.S.C. §107d-1(a)(1982).

In addition, section 107d-2(a) provides:

> Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary [of Education] shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

Other sections of the Randolph-Sheppard Act are set out in Appendix F, pp. A-42-57.

STATEMENT OF THE CASE

A. The Randolph-Sheppard Act

The Randolph-Sheppard Act, 20 U.S.C. §107 *et seq.*, provides for the licensing, training and placement of blind persons as operators of vending stands for the sale of food, beverages, newspapers, tobacco products, etc. on federal, state, and other property. The United States Department of Education administers the Act on the national level and designates the state commission for the blind in each state or some other state agency as the administrator on the state level, 20 U.S.C. §107(a)(4). In Arkansas, the Arkansas Department of Human Services, Division of Services for the Blind, has been designated as the state agency to administer the Act. The State carries out the Act, provides training of vendors, selects vendors to operate the stands, provides for an initial stock of supplies, and performs other management functions. State expenses incurred in adminstration of the Act are drawn from federal grant funds under Title I of the Rehabilitation Act of 1973, 29 U.S.C. §§720 *et seq.*, as amended, which are awarded to the states to provide

vocational rehabilitation services for the handicapped. 29 U.S.C. §723(b). The federal government contributes 80% of these funds and the state 20%. 29 U.S.C. §706(7). George McNabb is a blind vendor, licensed by the State under the Act to operate a vending stand in Arkansas.

The Randolph-Sheppard Act was amended in 1974 to provide for the arbitration of grievances of blind licensees. 20 U.S.C. §107d-1(a) and (b). In addition, the Act requires state agencies desiring to be designated as the state licensing agency to make written application to the Secretary of Education and to agree, among other requirements, to provide blind vendors with grievances an opportunity for a fair hearing on the state level and to submit unresolved grievances to arbitration. 20 U.S.C. §107(b)(6).[1] Any blind vendor who is dissatisfied "by any action arising from the operation or administration of the vending facility program" may file a complaint with the Secretary of Education who shall convene a panel to arbitrate the dispute. 20 U.S.C. §107d-1(a). Upon receipt of a complaint, the Secretary shall convene an arbitration panel which shall conduct a hearing and render a decision. The arbitration decision shall be final and binding on the parties except the decision is subject to appeal and review as a final agency decision under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, 20 U.S.C. §107d-1(a) and §107d-2(a). The Act does not specify any of the remedial powers of the arbitration panel.

---

[1] The Rehabilitation Act of Arkansas, *Ark. Code Ann.* 20-79-201 *et. seq.* (1987) provides the mechanism for operation of the Randolph-Sheppard Act in Arkansas. Act 393 of the Acts of 1975, *Ark. Code Ann.* §25-10-204(c) (Section 2(e), authorized the state agency to enter into contracts with the federal government and to adopt such methods of administration as the federal government required to assure its maximum financial involvement in programs for the blind. Acting pursuant to legislative authority, the Arkansas agency for the blind made application to adminster the Randolph-Sheppard program and, among other enumerated conditions, agreed to arbitrate vendor's grievances.

B. The Grievance and Arbitration Proceedings

In September, 1980, the state agency for the blind opened for bid three new vending stands on telephone company property in Little Rock, Arkansas. McNabb bid for the telephone stands, which were much more profitable than his current stand. The state agency awarded one stand to a vendor with more seniority than McNabb and the remaining two stands to blind vendors with less seniority than McNabb. McNabb first filed a grievance and received a state evidentiary hearing as provided by the Act regarding his entitlement to one of the stands given to a less senior vendor, but the hearing officer ruled in favor of the state agency.

On April 7, 1981, McNabb filed a complaint with the Department of Education pursuant to 20 U.S.C. §107d-1(a) requesting an arbitration panel be convened to decide his entitlement to the telephone stands awarded to less senior vendors and contending the agency had violated its transfer and promotion rules. On January 25, 1983, McNabb amended his complaint to request backpay or damages, attorney's fees and costs. On December 29, 1983, a three member arbitration panel issued a decision finding McNabb was improperly denied a vending stand in violation of applicable law and regulations. The arbitration panel issued an interlocutory award giving McNabb, in summary, a continuing right of assignment to a comparable vending stand when one became available. After accepting assignment to a stand, McNabb was also given the right by the arbitration awards to return to the arbitration panel for the purpose of requesting monetary relief for his losses during the time he was denied a stand as well as attorney's fees and costs.

The first comparable stand became available in October, 1985, and after accepting it, McNabb requested in a letter dated November 5, 1985, to George A. Conn, Commissioner of the Rehabilitation Services Administration, Department of Education, that the arbitration panel be reconvened for the purpose of

considering his claim for compensatory relief.[2] Commissioner Conn refused to reconvene the arbitration panel, contending that monetary relief was not authorized by the Randolph-Sheppard Act and a monetary award would violate the principle of sovereign immunity embodied in the Eleventh Amendment to the Constitution. Commissioner Conn later notified McNabb that his decision refusing to reconvene the arbitration panel constituted a final decision of the Department of Education.

C. Opinion of the District Court

On April 22, 1986, McNabb filed suit in the U.S. District Court for the Eastern District of Arkansas pursuant to 28 U.S.C. §1331 and 20 U.S.C. §107d-2 seeking an order compelling the Secretary of Education to reconvene the arbitration panel to decide his claim for monetary relief. The state agency was named as a Rule 19(a) Fed.R.Civ.P. defendant. On May 26, 1987, the district court entered summary judgment in favor of McNabb, finding an arbitration panel convened pursuant to the Randolph-Sheppard Act does have the authority to award compensatory relief and attorney's fees. The court ordered the Secretary to convene the arbitration panel to consider the award of compensatory relief, attorney's fees and costs. The district court followed the decision of the Third Circuit Court of Appeals in *Delaware Department of Health v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985), the only other circuit court to consider this issue.

In *Delaware*, a blind vendor appealed from a district court decision vacating an arbitration award granting him backpay and attorney's fees. The Third Circuit reversed, holding that the Randolph-Sheppard Act authorizes compensatory damage awards because by choosing arbitration to redress grievances,

---

[2] During the year following the arbitration award, no comparable stand became available. On December 28, 1984, the parties petitioned the arbitration panel to extend the interlocutory award for an additional year, which was done.

Congress intended the arbitration panel to have all remedies that arbitrators used under the U.S. Arbitration Act and in labor arbitration. *Id.* at 1130, 1136. The Third Circuit further found that states waived any application of the Eleventh Amendment when, after notice of the requirement of arbitration, it voluntarily made application to the Secretary of Education to participate in the program. *Id.* at 1137-38.

D. **Opinion of the Circuit Court**

Both the Department of Education and the Arkansas Division of Services for the Blind appealed to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1291, contending that a lack of statutory authorization and the Eleventh Amendment bar any award of compensatory relief by an arbitration panel. In a decision issued December 5, 1988, the panel consisting of Chief Judge Lay, Judge Fagg, and District Judge Doty issued a *per curiam* opinion with three separate concurring and dissenting opinions. Judge Lay would affirm the district court's judgment holding both that the Randolph-Sheppard Act authorizes arbitration panels to assess compensatory damage awards against state agencies and that Congress has abrogated Eleventh Amendment sovereign immunity for states which participate in the blind vendor program (Appendix A, p. 6). Judge Fagg would hold that the Act does not authorize any awards of money damages against the states since nowhere in the Act does Congress adequately alert states they are subjecting themselves to monetary remedies. (Appendix A, pp. 10-11). Judge Doty would hold that the State has not knowingly waived its Eleventh Amendment immunity to retroactive money damages and that because of Eleventh Amendment constraints, Congress only intended the arbitration panel to award prospective damages from the date of the arbitration award on December 29, 1983, to the date McNabb accepted assignment to the new vending stand on October 10, 1985. The result of the three opinions is that the arbitration panel was found authorized to award only prospective damages and was ordered to reconvene to consider prospective damages and attorney's fees.

ARGUMENT

A. The Decision Below Directly Conflicts With A Decision Of The Third Circuit Court Of Appeals. Supreme Court Rule 17.1(a)

Only the Eighth Circuit, in this case, and the Third Circuit Court of Appeals have considered the issue of whether an arbitration panel convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. §107 *et. seq.*, has the authority to award compensatory relief. See *Delaware Department of Health and Social Services, Division for the Visually Impaired v. United States Department of Education,* 772 F.2d 1123, 1131 (3rd Cir. 1985). Both cases involved arbitration of vendor grievances alleging violations of state agency transfer and promotion rules. Both cases also considered the issues of whether the Act authorized compensatory relief as well as attorney's fees, and whether the Eleventh Amendment barred an arbitration panel from awarding such relief. The cases, however, reach different conclusions.

The *Delaware* case involved Robert Albanese, a blind vendor, who was awarded retroactive monetary relief and attorney's fees by an arbitration panel who found Albanses was improperly denied a transfer under the state agency rules. The District Court held the Randolph-Sheppard Act did not authorize retroactive relief or attorney's fees, but the Third Circuit reversed. After extensively reviewing the history of the Randolph-Sheppard Act, the Third Circuit concluded the Act authorizes compensatory damage awards against state agencies because Congress intended arbitration to be used in the same manner as in the U.S. Arbitration Act, 9 U.S.C. §1, and in labor arbitration under collective bargaining agreements where arbitrators award retrospective compensatory relief in appropriate cases as a matter of course. *Id.* at 1125-30, 1136. The Third Circuit also found Delaware was bound under the Randolph-Sheppard Act to arbitrate Albanese's claim for monetary relief because the

State had entered into a contractual relationship with the United States which required arbitration of vendors' grievances. *Id.* at 1137. In addition, the Third Circuit held Delaware waived any application of the Eleventh Amendment because after notice of the Act's requirements, the State voluntarily made application with the United States Department of Education to administer the Randolph-Sheppard program. *Id.* at 1137-38.

In the present case, a sharply divided panel of the Eighth Circuit was unable to agree on the application of the Eleventh Amendment to the Randolph-Sheppard Act, and wrote separate opinions with three different views of the Eleventh Amendment and the Act. This resulted in a holding that an arbitration panel is authorized to award only prospective damages from the date of the arbitration award (Appendix A, p. 5).

Chief Judge Lay would hold that Congress has abrogated sovereign immunity for states which participate in the blind vendor program because Congress clearly intended to provide Randolph-Sheppard arbitration panels with the full range of traditional remedial powers of arbitrators, including compensatory relief. (Appendix A, pp. 6 & 9). He cited *Welch v. State Department of Highways and Public Transportation,* 483 U.S. ____, 107 S.Ct. 2941, 97 L.Ed.2d 391 (1987), in support of his views. Judge Lay also concluded it is tenuous to assume that a proceeding in federal court to enforce an arbitration award against the State is even covered by the Eleventh Amendment (Appendix A, p. 8 f.n. 2).

Judge Fagg would hold that Congress has the authority to condition involvement in the Randolph-Sheppard program on the State's acceptance of an exposure to monetary consequences arising from participation in the program. (Appendix A, p. 10). He would find, however, that the states did not knowingly accept this risk when they agreed to arbitration as the mechanism for resolving vendor grievances because the Act makes no express reference to monetary damages and thus does not clearly

inform the states of this possibility. (Appendix A, pp. 11-12). Judge Fagg relies on *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) (Pennhurst I).

Judge Doty would hold that in viewing the Randolph-Sheppard Act against the backdrop of the Eleventh Amendment, it is clear Congress only intended the arbitration panel to grant prospective relief and did not abrogate the State's rights under the Constitution (Appendix A, p. 13).

As the Eighth Circuit's decision is in direct conflict with that of the Third Circuit, the grant of certiorari to review the judgment below is justified under Supreme Court Rule 17.1(a).

B. The Court Below Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court. Supreme Court Rule 17.1(c)

The questions of the remedial power of a Randolph-Sheppard Act arbitration panel and of whether the Eleventh Amendment applies to decisions of an arbitration panel are important questions which affect the administration of the Randolph-Sheppard program and the rights of blind vendors in all 50 states. Another appeal is also pending on this issue before the Eleventh Circuit in *Georgia Department of Human Resources v. Bennett*, No. 88-8120, in which oral argument was held on October 31, 1988. In addition, a class of blind vendors currently seek money damages under the Randolph-Sheppard Act from the District Court of Columbia. See *Committee of Blind Vendors v. District of Columbia*, (Case 88-0142) 695 F.Supp. 1234 (D.D.C. 1988). As things now stand, the remedies an arbitration panel may award will vary according to the circuit in which the arbitration takes place until this issue is resolved by the Supreme Court.

Moreover, the decision of the Eighth Circuit impedes effectuation of the policies Congress sought to promote when it amended the Randolph-Sheppard Act to provide for arbitration. The findings section of Pub. L. No. 93-516, §201, establishes that Congress took legislative action to require the uniform treatment of blind vendors by all Federal agencies; the establishment of uniform guidelines for state operation of the program; coordination among responsible agencies; establishment of adequate administrative and judicial remedies to assure fair treatment of all in the program; and creation of stronger administration and oversight functions within the Federal Government to ensure full compliance with the law and regulations. Senate Report 93-937 issued on June 17, 1974, to accompany SZ581, 93rd Congress, 2d Session, p. 13, and Pub. L. 93-516, §201. A decision which prevents an arbitration panel from awarding compensatory relief does not provide for meaningful remedies for blind vendors.

C. The Decision Below Also Conflicts In Principle With Supreme Court Cases Regarding The Status Of Arbitration And The Remedial Power Of Arbitrators. Supreme Court Rule 17.1(c)

The decision of the Eighth Circuit also raises novel and important questions regarding the nature of arbitration and the Eleventh Amendment's application to the decisions of arbitrators. In addition, the decision also conflicts in principle with Supreme Court cases on these areas of the law. Supreme Court Rule 17.1(c).

The significance of the Eleventh Amendment is that the principle of sovereign immunity deprives federal courts established under Article III of the Constitution from exercising jurisdiction over state governments. *Pennhurst State Schools v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 79 L.Ed.2d 67, 76-77 (1984) (Pennhurst II); *Welch v. State Department of Highways and Public Transportation*, 483 U.S. at ____, 107

S.Ct. at 2945, 97 L.Ed.2d at 395. This Court's Eleventh Amendment decisions only discuss the applicability of the Eleventh Amendment to an Article III Court. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 236, 105 S.Ct. 3142, 87 L.Ed.2d 171, 175 (1985); *Welch*, 107 S.Ct. at 2944, *Pennhurst I*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981); *Edelman v. Jordan*, 415 U.S. 651, 656, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Congress, acting under Article I of the Constitution, is empowered, however, to create statutory rights and assign their adjudication to forums other than Article III courts. *Northern Pipeline construction Co. v. Marathon Pipeline Company*, 458 U.S. 50, 83, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). This is precisely what Congress did in the Randolph-Sheppard Act because arbitration is regarded as an alternative, nonjudicial forum in which the parties consent to have their disputed determined by an arbitrator and waive adjudication in federal court as well as waiving any claimed constitutional rights the parties may have. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583-94, 105 S.Ct. 3325, 87 L.Ed.2d 409, 421 (1985); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848, 106 S.Ct. 3245, 92 L.Ed.2d 675, 691 (1986); *McDonald v. City of West Branch*, 466 U.S. 284, 288, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984).

In the present case, Congress created a specific cause of action against the states and elicited the consent of the states to resolve grievances in arbitration. Arbitration is the only means under the Act to enforce vendors' rights. The grant of jurisdiction to the arbitration panel is also broad and allows the panel to resolve any grievances filed by a vendor who is dissatisfied with any action arising from the operation or administration of the Randolph-Sheppard Program. 20 U.S.C. §107d-1(a). The decision of the arbitrator is final and binding on the parties, except the decision is subject to appeal and review as a final agency decision under the Administrative Procedure Act, 20 U.S.C. §107d-1(a) and §107d-2(a). Thus, arbitration under the

Randolph-Sheppard Act is not a cause of action in an Article III court to which the Eleventh Amendment applies.

Secondly, the decision of the Eighth Circuit runs counter to the federal policy favoring arbitration and requiring that the federal courts vigorously enforce agreements to arbitrate. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983); *Mitsubishi Motors Corp. v. Solar Chrysler Plymouth*, 473 U.S. 614, 625-26, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985). *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

Finally, it has also been understood that where arbitration is accepted as the means to resolve disputes, the appointment, as a matter of course, carries with it the power to fashion an appropriate remedy. In *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960), this Court discussed the power of an arbitrator to fashion remedies to resolve a particular grievance:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

Id. at 597. *Enterprise* has been read to mean that an arbitrator has the power to fashion an appropriate remedy, including compensatory damages, unless that power is specifically negated in the contract. *Lodge 12, Machinists v. Cameron Iron Works*, 292 F.2d 112 (5th Cir. 1961), cert. denied 368 U.S. 926 (1961); *IUE v. Peerless Pressed Metal Corporation*, 489 F.2d 768 (1st Cir. 1973); *Lynchburg Foundry Co. v. Steelworkers Local 2556*, 404 F.2d 259 (4th Cir. 1968).

Thus, a writ of certiorari should be granted to resolve these conflicting principles regarding the nature of arbitration and the Eleventh Amendment's application to arbitration.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

Melva Harmon Kozinsky
904 West Second Street
Little Rock, Arkansas 72201
(501) 372-1133

Counsel for Petitioner

May 16, 1989

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2017

George McNabb,
Appellee

v.

United States Department of Education, and
William Bennett, Secretary of the
U.S. Department of Education
Appellants

Arkansas Department of Human Services,
Division of Services for the Blind

No. 87-2078

George McNabb,
Appellee,

v.

United States Department of Education, and
William Bennett, Secretary of the
U.S. Department of Education,

Arkansas Department of Human Services,
Division of Services for the Blind,
Appellant.

Submitted: April 13, 1988

Filed: December 5, 1988

Appeals from the United States District Court for the
Eastern District of Arkansas.

Before LAY, Chief Judge, FAGG, Circuit Judge, and DOTY,* District Judge.

PER CURIAM.

The United States Department of Education and the Division of Services for the Blind of the Arkansas Department of Human Services (the State) appeal from the district court's[1] grant of summary judgment in favor of George McNabb. The district court ordered the Secretary of Education to convene an arbitration panel pursuant to the Randolph-Sheppard Act, 20 U.S.C. §§107-107f, to consider McNabb's request for compensatory relief, attorney's fees, and costs.

I. BACKGROUND

The Randolph-Sheppard Act (the Act) created a cooperative federal-state program for the licensing, training, and placement of blind persons as operators of vending facilities on federal, state, and other properties. The Department of Education administers the Act on the federal level, and has designated the Arkansas Department of Human Services, Division of Services for the Blind, to administer the Act in Arkansas.

McNabb is a blind person licensed under the Act to operate a vending facility in Arkansas. On September 12, 1980, McNabb bid for three telephone company vending facilities. In violation of applicable laws and regulations, two of these facilities, which were more profitable than the stand McNabb then operated, were awarded to blind vendors with less seniority than McNabb.

---

*The Honorable David S. Doty, United States District Judge for the District of Minnesota, sitting by designation.

[1] The Honorable William R. Overton, United States District Judge for the Eastern District of Arkansas.

On October 20, 1980, McNabb filed a grievance, requesting a full evidentiary hearing as provided for in 20 U.S.C. §107d-1(a).[2] On February 11, 1981, the hearing officer upheld the denial of the vending stands to McNabb.

McNabb then filed a complaint with the Department of Education, also pursuant to 20 U.S.C. §107d-1(a), requesting that an arbitration panel be convened to decide his entitlement to one of the facilities he had been denied. He later amended his complaint to request specific relief: assignment to one of the stands with damages for the period he was denied a stand, as well as attorney's fees and costs.

The arbitration hearing was held on September 8, 1983. After the hearing but before the arbitration panel issued its decision, Commissioner Conn, the Rehabilitation Services Administrator of the Department of Education, informed the parties that the Secretary of Education took the position that neither compensatory relief nor attorney's fees were contemplated under the Act and that such awards would be contrary to the principle of sovereign immunity.

On December 29, 1983, the arbitration panel issued its decision, finding that McNabb had wrongfully been denied one of the stands. As relief, the panel gave McNabb a continuing right of assignment to the first of the two stands at issue that became

---

[2] 20 U.S.C. §107d-1(a) (1982) provides:

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

vacant. He was also given a continuing right of assignment to any other facility for which he submitted an application. The panel also stated that after McNabb was assigned a vending facility, he had the right to request the panel to consider awarding additional compensatory relief in the form of back pay, attorney's fees, and costs.

On October 10, 1985, McNabb accepted assignment to a new vending facility. The following month, he asked Commissioner Conn to reconvene the arbitration panel to award him additional relief. Conn refused to reconvene the panel, once again taking the position that the Act and the eleventh amendment precluded the panel from awarding compensatory relief or attorney's fees against state agencies. He later informed McNabb that his refusal to reconvene the panel constituted the final agency decision of the Secretary of Education.

McNabb sought review in federal district court of the Secretary's decision, pursuant to 20 U.S.C. §107d-2(a).[3] The district Court held that arbitration panels convened pursuant to the Act have the authority to award compensatory relief and attorney's fees. Without specifically discussing the issue of

---

[3] 20 U.S.C. §107d-2(a) (1982) provides:

> Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

The statute's references to Chapters 5 and 7 of Title 5 are to the administrative procedure and judicial review provisions of the Administrative Procedure Act. The Act thus incorporates by references 5 U.S.C. §706, which allows district courts to set aside agency actions that are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, without observance of legally-required procedures, or unsupported by substantial evidence.

whether the eleventh amendment barred such awards, the district court stated that it chose to follow the Third Circuit's decision in *Delaware Dep't of Health and Social Servs., Div. for the Visually Impaired v. United States Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985). In *Delaware*, the Third Circuit, which is the only circuit court that has considered this question, held that: (1) the Act impliedly authorizes compensatory damage awards against state agencies; (2) states that choose to participate in this federally-created program for blind vendors thereby waive their eleventh amendment immunity; and (3) attorney's fees are an appropriate element of compensatory damages for breach of a contract between a blind vendor and a state agency.

Both the United States Department of Education and the Arkansas Department of Human Services appeal the district court's decision. We affirm as hereinafter modified. Judges Fagg and Doty find that the arbitration panel is not authorized to award McNabb retroactive money damages against the state. Judge Fagg would hold that the Act does not authorize any awards of money damages against the states. Judge Doty would hold that the state has not waived its eleventh amendment immunity to retroactive money damages. Chief Judge Lay and Judge Doty find that the arbitration panel is authorized to award prospective damages from the date of the panel's decision, December 29, 1983, to the date McNabb accepted assignment to a new vending facility, October 10, 1985.

The district court's order to the Secretary of Education to reconvene the arbitration panel is therefore affirmed, with the above-stated modification of the scope of the panel's authority to award damages.

LAY, Chief Judge, concurring and dissenting.

I would affirm the district court's judgment. I would hold both that the Act authorizes arbitration panels to assess compensatory damage awards against state agencies and that Con-

gress has abrogated sovereign immunity for states which participate in the blind vendor program.

When Congress undertook in 1974 to revise and modernize the Randolph-Sheppard Act, it did so "by removing some of the major external obstacles to the growth of the blind vendor program operating thereunder, by centralizing the direction of the program, by providing for substantial uniformity in the administration of the program by the States, and by *protecting the livelihood, rights, and economic interests of blind vendors.*" S.Rep.No. 937 to accompany S.2581, 93d Cong., 2d Sess. 3 (1974) (emphasis added). One of the means by which Congress sought to protect the rights and economic interests of blind vendors was by requiring participating states to agree to submit to arbitration of grievances raised by vendors. 20 U.S.C. §107d-1(a) (1982); *see also Delaware Dep't of Health and Social Servs., Div. for the Visually Impaired v. United States Dep't of Educ.*, 772 F.2d 1123, 1125-31 (3d Cir. 1985) (describing background and legislative history of the Act and its 1954 and 1974 amendments). By providing for arbitration of disputes between states and vendors, Congress clearly must have foreseen and approved awards of compensatory relief against states. As succinctly and persuasively stated by the Third Circuit:

> When Congress in 1974 provided that states desiring to gain access to blind vendor locations in federal facilities must agree to submit to arbitration their disputes with blind vendors, the term arbitration had a well-recognized meaning. Congress was surely aware that arbitrators proceeding under the authority of the Federal Arbitration Act or under the authority of the Uniform Arbitration Act, as a matter of course awarded retrospective compensatory relief in appropriate cases. *See Generally*, G. Wilner, Domke on Commercial Arbitration, §30.02 (rev. ed. 1984). Furthermore, awards of backpay in arbitrations under collective bargaining agreements were, by then, commonplace. *See, e.g., United Steelworkers of America*

v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

* * *

> Since contract arbitration was in 1974 a legal concept with a well-settled content, there is no ambiguity in Senator Randolph's choice of the term. Moreover there is not one iota of legislative history suggesting that, insofar as it dealt with the relief which arbitrators could award, the term was understood by any member of Congress to have any meaning other than the conventional one.

Id. at 1136. I agree, for the reasons thus stated by the Third Circuit, that Congress's intent to provide Randolph-Sheppard arbitration panels with the full range of traditional remedial powers could not be clearer.[1]

---

[1] In the *Steelworkers Trilogy* cases, the Supreme Court broadly defined an arbitrator's power to fashion remedies in labor dispute cases.

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.* There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (emphasis added).

The same power is recognized to be within an arbitrator's authority in commercial arbitration cases. *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979). The Commercial Arbitration Rules of the American Arbitration Association have long provided in section 42, which covers the scope of the award, that an arbitrator "may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." Both areas of arbitration have recognized an arbitrator's traditional authority to include broad remedial power.

I also agree with the Third Circuit's conclusion that the eleventh amendment is not a bar to awarding compensatory relief against state agencies under the Randolph-Sheppard Act,[2] although my reasons for so concluding are somewhat different from the Third Circuit's. The Third Circuit stated that states *waive* their eleventh amendment immunity by applying to participate in the Randolph-Sheppard program and agreeing to submit to the grievance procedures and remedies the program requires. *See id.* at 1137-38; *see also* 20 U.S.C. §107(b) (1982) (providing that states shall apply to participate in the program and agree to certain enumerated conditions). I find, however, that this is an instance of congressional intent to *abrogate* the eleventh amendment immunity of those states that participate in the program, and therefore do not reach the question whether the state has waived its immunity. *See Welch v. State Dep't of Highways and Pub. Transp.*, 107 S.Ct. 2941, 2946 & n.4 (1987) (indicating that the question whether a state has waived its immunity is different from the question whether Congress has abrogated the states' immunity).

Simply stated, when Congress mandated in the Randolph-Sheppard Act that blind vendors submit their grievances to arbitration, it contemplated that the arbitrators would have the authority to award compensatory relief. The only parties with whom blind vendors can have disputes to submit to arbitration are states. Hence, Congress must have contemplated that states would be subject to the full remedial relief traditionally

---

[2] Since my view of the eleventh amendment is in the minority, for purposes of argument, I have assumed that an enforcement proceeding in federal courts of an arbitration award against the state would violate the eleventh amendment.

However, I submit this assumption is tenuous. The arbitration proceeding does not involve a suit in federal court against a state. There is no eleventh amendment issue actually before us. The issue *here* is whether the arbitrator can make an award involving money damages against the state in an arbitration proceeding.

available in arbitration proceedings. I submit this legislation demonstrates clear congressional intent to abrogate sovereign immunity of the participating states. *See Welch*, 107 S.Ct. at 2947-48.[3]

Finally, I would hold that the question whether the arbitration panel has the authority to award attorney's fees as part of the compensatory damage is a question more properly decided in the first instance by the arbitration panel when it reconvenes. The Third Circuit's opinion in *Delaware* reached this question because the arbitration panel in that case had addressed the issue and exercised its discretion. We have no occasion to address the question until the matter is fully arbitrated.

FAGG, Circuit Judge, concurring and dissenting.

Congress in enacting the Randolph-Sheppard Act (the Act) has not conditioned the states' participation in the blind licensee program on their accepting responsibility for the payment of monetary relief later deemed appropriate to make a wronged licensee whole. Thus, I disagree with Chief Judge Lay that "the Act authorizes arbitration panels to assess compensatory damage awards against state agencies." *Ante* at 6. I also disagree with Judge Doty to the extent he joins Judge Lay in holding the Act permits an arbitration panel to award prospec-

---

[3] I would thus hold that the authority of Congress to subject states to suit in federal court is not limited to those instances when Congress acts pursuant to section 5 of the fourteenth amendment. *Cf. Welch*, 107 S.Ct. at 2946 (assuming without deciding that congressional power is not so limited); *United States v. Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987) (Congress may abrogate eleventh amendment immunity when it acts pursuant to its commerce clause powers), *cert. granted*, 108 S.Ct. 1219 (1988); *McVey Trucking, Inc. v. Illinois (In re McVey Trucking, Inc.)*, 812 F.2d 311 (7th Cir.) (same, when Congress acts pursuant to Bankruptcy clause), *cert. denied*, 108 S.Ct. 227 (1987); *See generally* Note, *More Plenary Than Thou: A Post-Welch Compromise Theory of Congressional Power to Abrogate State Sovereign Immunity*, 88 Colum.L.Rev. 1022 (1988).

tive damages against the states "for the time that elapses after an award until the [licensee] is actually in place." *Post* at 14; *see also ante* at 6.

Without question, states like Arkansas that choose to participate in this cooperative federal-state program have "agree[d] to submit the grievances of any blind licensee * * * to arbitration." 20 U.S.C. §107b(6). Further, Congress undoubtedly has the authority to condition involvement in the program on a state's acceptance of an exposure to monetary consequences arising from participation. *See e.g., Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst*). The critical question in this case is whether participating states knowingly accept that risk when they agree to "arbitration" as the mechanism for resolving grievances with dissatisfied licensees. I think not.

The type of obligation sought to be imposed on the State of Arkansas in this case is permitted only if the Act clearly informs states considering participation that if they choose to enter the program, liability for money damages may result. *See id.* at 16-17. In my view, the Act does not offer the states an informed choice — that is, by its terms the Act does not adequately alert states to the risk of encountering monetary consequences at the hands of an arbitration panel convened by the Secretary if they join the program.

Nowhere in the Act is there express reference to monetary remedies affecting participating states. In addition, the Act's legislative history is conspicuously silent on whether Congress intended arbitration panels to make monetary damage awards against participating states. The court and the Third Circuit nevertheless find the prerequisite disclosure in the Act's general provision for arbitration. *See ante* at 7; *Delaware Dep't of Health & Social Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1136 (3d Cir. 1985) (*Delaware*). Under their theory, legislation that provides for arbitration necessarily implies Congress intended to include monetary damage awards because

those awards have long been legitimate weapons in an arbitrator's arsenal. In essence, the argument goes: because damages may traditionally be awarded by arbitrators, damages must be part of the package bargained for when a state elects to enter a program calling for arbitration. *See Delaware*, 772 F.2d at 1136-37. I disagree. A state's informed choice to accept an obligation to pay money damages cannot rest on an implied statutory authorization, *see Pennhurst*, 451 U.S. at 17, 25, and, in my view, certainly not on one as fragile as the court contends exists in this case.

I have no reason to disagree with the *Delaware* court's loosely couched characterizations that at the time the Act was revised to provide for arbitration, the term arbitration had a "well-recognized" meaning, and that arbitral awards of damages were "commonplace." *Delaware*, 772 F.2d at 1136. Nor do I have any reason to challenge Chief Judge Lay's assertion that " 'Congress was surely aware * * * arbitrators * * * as a matter of course awarded retrospective compensatory relief in appropriate cases.' " *Ante* at 7 (quoting *Delaware*, 772 F.2d at 1136). Such a description of Congress' perception may indeed be accurate, including the speculation that Congress anticipated "awards of compensatory relief [would be entered] against states." *Id.*

Significantly, none of these unstructured characterizations takes account of the essential litmus test for determining the remedies available against a state under the Act. They focus entirely on assumptions about Congress' unspoken understanding of the ultimate consequences of its legislative package. The Supreme Court, however, "insist[s] that Congress speak with a clear voice." *Pennhurst*, 451 U.S. at 17; *see also id.* ("[W]e may assume that Congress will not implicitly attempt to impose massive financial obligations on the [s]tates."). In light of the Supreme Court's insistance on articulated statutory conditions, I believe the *Delaware* court is skating on thin ice when it concludes the term "arbitration," standing alone, is "unambiguous." *Delaware*, 772 F.2d at 1137.

By authorizing money damages under the Act, the court and the Third Circuit have required states unwittingly to expose themselves to potentially sizeable financial obligations. They do so on the strength of an oblique reference to a dispute resolution mechanism that encompasses multiple remedies, including many with nonmonetary characteristics. *See Committee of Blind Vendors v. District of Columbia,* No. 88-0142-0G, slip op. at 1 (D.D.C. Oct. 7, 1988) (action seeking approximately $1,166,000 in damages). This exposure is entirely at odds with the principle that the congressional power to impose conditions on participating states rests on the indispensable requirement that its conditions are "expressly articulated." *Pennhurst*, 451 U.S. at 16. Neither Congress, nor a court interpreting the Act, is permitted to "surpris[e] participating [s]tates with postacceptance * * * conditions." *Id.* at 25.

Ironically, the *Delaware* court's and this court's willingness to award prospective damages, *ante* at 6, create a powerful incentive for states to steer clear of laudable state-federal programs for fear of incurring hidden, but nevertheless significant, financial liability. Thus, the very people the program was designed to benefit — the blind licensees — may ultimately be the losers. I would hold the Act does not authorize any awards of money damages against the states and reverse the district court.

Finally, with regard to attorney's fees, the arbitration panel may determine that attorney fees should be paid be the Secretary of Education rather than by the State of Arkansas. *See* 20 U.S.C. §107d-2(d). If that occurs, my concerns about monetary awards against states would not be implicated. Thus, I agree with Chief Judge Lay that "the question whether the arbitration panel has the authority to award attorney's fees * * * is a question more properly decided in the first instance by the arbitration panel when it reconvenes." *Ante* at 10.

DOTY, District Judge, concurring and dissenting.

The issue to be decided by this court is whether the Act, as amended, authorizes an award by the arbitration panel of

money damages, and the extent of those damages. When the Act is viewed against the backdrop of the eleventh amendment, it is seen that Congress only intended that the arbitration panel authorized by 20 U.S.C. §107d-1(a) have the necessarily implied powers to grant prospective relief, and did not intend to abrogate the state's rights under the Constitution. This conclusion is reached because, in enacting the Randolph-Sheppard Act, Congress did not make it unambiguous that the state's participation in the blind vendors program would result in a waiver of its sovereign immunity or condition its participation on accepting all forms of monetary relief, including retroactive damages. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). It is clear and unambiguous that Congress meant the arbitration panel established by the Act to have the authority to grant prospective relief in the form of an award of preferential consideration for another facitlity. Such authority carries with it the necessary remedial power to compensate an affected vendor for the time that elapses after an award until the vendor is actually in place.

Under §107d-2(d), I believe that the vendor should also be reimbursed for any costs, including reasonable attorney's fees, made necessary by the acts of the Secretary. This holding avoids the onerous effect on a state treasury of retroactive damage awards, *Edelman v. Jordan*, 415 U.S. 651, 665, 668 (1974), while effectuating the remedial provisions of the Act. I would not follow the holding of the Third Circuit in *Delaware Dep't of Health & Social Servs., Div. for Visually Impaired v. United States Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985), as I believe the legal underpinnings of that case have been fatally eroded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[To be published.]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR C 86 223

George McNabb,
Plaintiff,

v.

United States Department of Education, and William Bennett, Secretary of the United States Department of Education, and Arkansas Department of Human Services, Division of Services for the Blind,
Defendants.

ORDER

Filed: May 26, 1987

This case is before the court on cross motions for summary judgment. All parties agree that there are no issues of fact in dispute and only issues of law remain.

The case arises under the Randolph-Sheppard Act ("the Act"), 20 U.S.C. §107, *et seq.*, as amended 1974, which authorizes a cooperative federal/state scheme for licensing, training and placing qualified blind persons in vending facilities on federal and other property. The federal agancy charged with administration of this statute is defendant United States Department of Education. Section 107(b) of the Act allows the Department of Education to designate a state licensing agency to administer the program in each state. Defendant Arkansas Department of Human Services, Division of Services for the Blind (DSB), has been designated to administer the Act in Arkansas.

The parties motions, exhibits and affidavits reveal that the following facts are not in dispute:

1. On or about September 4, 1980, the state agency notified all blind vendors in Arkansas licensed by the agency that three vending facilities, given numbers VF042, VF043 and VF079, at Southwestern Bell Telephone Company in Arkansas were opened for bids.

2. On September 12, 1980, plaintiff bid for the three telephone company facilities or stands, but two of the stands, VD079 and VD043, were awarded to blind vendors with less seniority than plaintiff. The stands for which plaintiff was not selected were much more profitable than the vending stand he operated at the time.

3. On October 20, 1980, plaintiff requested a full evidentiary hearing as provided by 20 U.S.C. §107d-1(a), which was conducted on January 8, 1981. On February 11, 1981, the hearing officer upheld the decision of the state agency which denied plaintiff the vending stands.

4. On April 7, 1981, plaintiff filed a complaint with the Department of Education, pursuant to 20 U.S.C. §107d-1(a), requesting that an arbitration panel be convened to decide his entitlement to one of the stands at the telephone company.

5. On January 27, 1982, George A. Conn, Commissioner, Rehabilitation Services Administrator of the United States Department of Education, informed plaintiff's attorney that an arbitration panel would be convened and requested that he be advised of the relief sought by plaintiff.

6. On or about January 25, 1983, plaintiff filed an amended complaint with the Department of Education seeking, in part, the following relief: assignment of one of the stands with back pay or damages for the period he was denied a telephone company stand, as well as attorney's fees and costs.

7. By letter dated February 8, 1983, Commissioner Conn acknowledged receipt of the amended complaint, and by letter dated June 7, 1983, commissioner Conn notified the parties that an arbitration panel would be convened.

8. As provided by 20 U.S.C. §107d-2, a three member arbitration panel was selected and a pre-arbitration conference was held on August 26, 1983.

9. The arbitration hearing was conducted on September 8, 1983. The issue before the panel was as follows: Was Mr. George McNabb denied vending facilities, identified as VF043 and VF079, by the agency in accordance with applicable law and regulations? If not, what is the appropriate remedy?

10. By separate letters dated October 26, 1983, Commissioner Conn advised the parties of the Secretary of Education's position that Federal law precluded the award of back pay and attorney's fees by the arbitration panel. The letter of October 26, 1983, also stated that the award of back pay violates the principle of sovereign immunity embodied in the Eleventh Amendment. It further stated attorney's fees are not part of the reasonable costs of arbitration under 20 U.S.C. §107d-2(d).

11. On December 29, 1983, the arbitration panel issued its decision finding that George McNabb had been denied VF043 in violation of applicable law and regulations.

12. The arbitration panel issued an interlocutory award. As relief, McNabb was given a continuing right of assignment to the first vacancy in either VF043 or VF079. Further, McNabb was given, for one calendar year following the date of the award, a continuing right of assignment to any other facility for which he submitted an application. Following the acceptance or refusal of another vending

stand as described in the award, McNabb was given the right to request additional relief from the arbitration panel who would direct a hearing with respect to the relief sought.

13. During the year following the issuance of the arbitration award, neither a telephone company stand nor another comparable vending facility became available to McNabb. On December 28, 1984, McNabb and the Division of Services for the Blind jointly petitioned the arbitration panel to extend the interlocutory award for an additional calendar year. By order dated April 12, 1985, the arbitration panel extended the interlocutory award as requested.

14. On October 10, 1985, McNabb accepted assignment to a new vending facility opened at the United States Post Office in North Little Rock, Arkansas. By letter dated November 5, 1985, McNabb's counsel wrote the arbitration panel members and Commissioner Conn requesting that the arbitration be reconvened for the purpose of awarding McNabb additional relief. By separate letter also dated November 5, 1985, Commissioner Conn was asked to issue purchase orders authorizing the arbitration panel to reconvene

15. By letter dated December 3, 1985, Commissioner Conn took the position that the Randolph-Sheppard Act and the principle of sovereign immunity embodied in the Eleventh Amendment to the United States Constitution precluded an arbitration panel from assessing retroactive monetary relief against states. He further stated that the Act does not authorize payment of attorney's fees as part of the reasonable costs of arbitration under 20 U.S.C. §107d-2(d).

16. By letter dated December 19, 1985, plaintiff's counsel asked Commissioner Conn to clarify whether the

arbitration panel would be reconvened to decide the issue of additional relief and whether the response of Commissioner Conn was a final agency decision of the Secretary of Education.

17. In a letter dated March 26, 1986, Commissioner Conn stated that his letter of December 3, 1985, constituted the Department's final decision not to reconvene the arbitration panel.

The issue before the court is whether an abitration panel convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. §107d-1 and 107d-2, may award monetary relief to an aggrieved person in the form of lost profits, damages and attorney's fees. In support of his motion the plaintiff asserts that the only circuit court to decide this issue upheld an arbitration panel's award of back pay and attorney's fees pursuant to the Act. *Delaware Dept. of health v. U.S. Dept. of Education*, 772 F.2d 1123 (3rd Cir. 1985). Defendants disagree with the third circuit's decision in *Delaware, supra*, and urge disallowance of an award of back pay and attorney's fees as beyond the scope of the Act and violative of the Eleventh Amendment to the United States Constitution. The defendants argue that the Act is silent on the remedies available to arbitration panels and assert that states cannot be subjected to monetary damage awards thereunder. They assert that when Congress has chosen to give the courts power to impose money damages on the states, "it has proved capable of saying so explicitly." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18 (1981).

This court chooses to follow the well-reasoned decision of the Second Circuit Court of Appeals in *Delaware Department of Health v. United States Department of Education*, 772 F.2d 1123 (3d Cir. 1985). After a thorough review of the Act and its legislative history, the court found that when Congress provided in the Randolph-Sheppard Act that states desiring access to blind vendor localities in federal facilities agreed to submit their

disputes with blind vendors to "arbitration", the term "arbitration" had a well-recognized meaning. *Delaware* at 1136. Arbitration, as a matter of course, included awards of retrospective compensation in appropriate circumstances. As such, it follows that arbitration panels convened pursuant to the Randolph-Sheppard Act have the authority to award compensatory damages. The court further held that the undertaking of the states participating in the Randolph-Sheppard program is to make blind vendors whole for state breaches of contract, and that an award of attorney's fees as contract damages is, in this unique circumstance, an appropriate means to that end. *Delaware* at 1139.

In the case at bar, the arbitration panel entered an interlocutory award stating:

> "whatever may be the authority of the Arbitration Panel to award back pay, attorney's fees, and costs to Mr. McNabb as additional relief in view of the contention of the Agency with respect to the . . . issue identified above and in view of the October 26, 1983 letter of the Commissioner, Rehabilitation Services Administration, representing that the right of a vendor to back pay, attorney's fees, and costs is being currently litigated in *Delaware v. United States Department of Education*." (Ct. record at 1, ex.7)

In view of the above, the court finds that an arbitration panel convened pursuant to the Randolph-Sheppard Act *does* have the authority to award compensatory relief and attorney's fees.

The plaintiff's motion for summary judgment is granted and the United States Department of Education is directed to reconvene an arbitration panel to consider the award of compensatory relief, attorney's fees and costs to the plaintiff.

Dated this May 22, 1987.

/s/ William R. Overton
Judge

APPENDIX C

DATE OF AWARD:

December 29, 1983

IN THE MATTER OF AN ARBITRATION UNDER THE PROVISIONS OF THE RANDOLPH-SHEPPARD ACT

Case No. R-S/81-2

George McNabb,
Grievant

and

State of Arkansas, Arkansas Department of Human Services, Division of Services for the Blind,
Respondent

BACKGROUND

This arbitration is the result of a Complaint filed by Mr. George McNabb under the provisions of the Randolph-Sheppard Act, 20 USC 107, as amended by the Randolph-Sheppard Act Amendments of 1974, Title II of P.L. 93-516.[1] Respondent is designated in accordance with 20 U.S.C. 107b, as

---

[1] Specifically applicable to this arbitration are the *Revised Interim Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5(a) and 6 of the Randolph-Sheppard Act as Amended* which were approved on February 3, 1978 by the Commissioner of Rehabilitation Services, Office of Human Development Services, Rehabilitation Services Administration and which are hereinafter identified as Interim Rules.

the State licensing agency for a vending facilities program in Arkansas and is identified herein as the Agency.[2]

The Complaint filed by Mr. McNabb alleges in essence that the Agency violated its transfer and promotion rules in connection with applications by Mr. McNabb for vending facilities at Southwestern Bell Telephone Company designated by the parties as VF043 and VF079, and violated 34 C.F.R. 1369.11 by failing to provide Mr. McNabb with training to overcome alleged management or operational deficiencies and to insure that his maximum vocational potential is achieved. Mr. McNabb is represented in connection with this arbitration by Ms. Melva Harmon, an attorney at law in the firm of Lavey, Harmon and Burnett, and the Agency is represented in connection with this arbitration by Mr. Arnold M. Jochums, an Assistant Attorney General in the Office of the Attorney General of the State of Arkansas.

On August 26, 1983, a pre-arbitration conference was held by the Arbitration Panel. The parties were represented at the pre-arbitration conference by their respective attorneys identified above and they agreed that this arbitration is in all respects in accordance with applicable law and regulations; that the Rules of the Agency applicable to a vendor being transferred or pro-

---

[2] At the time the Complaint was filed by Mr. McNabb the State licensing agency was the Office for the Blind and Visually Impaired of the Arkansas Department of Human Services, Division of Rehabilitation Services. Moreover, the initial designation of a State licensing agency for the State of Arkansas was by the Department of Health, Education, and Welfare and the federal department now administering the vending facilities program is the U. S. Department of Education which is identified herein as Department of Education. Discussions of the Randolph-Sheppard Act and the right to arbitration which it provides a blind vendor are found in *Jessie C. Nash v. The Georgia Department of Human Resources, Division of Vocational Rehabilitation*, Case No. R-S/78-1, and in *Robert Albanese v. State of Delaware, Division for the Visually Impaired, Department of Health and Social Services*, Case No. R-S/81-5.

moted to a vending facility do not require that the vendor be as qualified as, or better qualified than, other applicants for the vending facility in order for the vendor to be assigned to the vending facility on the basis of relevant seniority;[3] that issues to be resolved by the Arbitration Panel are as stated below; and that each party would file a pre-hearing brief.[4]

The hearing in connection with this arbitration was held on September 8, 1983. Each party was ably represented at the hearing by the attorney identified above and each party was provided an opportunity to present the sworn testimony of witnesses, exhibits, and oral arguments. Moreover, a transcript of the hearing was made and a copy was provided to each member of the Arbitration Panel.

Executive sessions of the Arbitration Panel were held on August 26, 1983 after the pre-arbitration conference and on September 8, 1983 after the hearing. Subsequent to the hearing, each party filed a timely post-hearing brief, Mr. McNabb filed the deposition of Mr. Jack W. Speir, and the Agency filed a

---

[3] The resulting understanding between the parties was that Mr. McNabb was entitled to a vending facility if he had the qualifications for the facility and if he had more relevant seniority than any other qualified applicant. This understanding became involved in this arbitration because of a refusal by the Agency to provide Mr. McNabb with the records of the vendors who were awarded the vending facilities involved in this arbitration and because Mr. McNabb was requesting these records on the assumption that his qualifications relative to those of these vendors were relevant to the issues in this arbitration. The understanding was possible because the Agency stipulated that Rules of the Agency only required a vendor to be qualified for a vending facility in order for the vendor to be assigned to the vending facility on the basis of relevant seniority.

[4] The pre-hearing briefs were requested by the Arbitration Panel because it was apparent at the pre-arbitration conference that the parties are in disagreement as to the remedies which the Panel has the authority to direct.

Petition to Supplement the Record and attached documents.[5] Moreover, by letter dated October 26, 1983, the Commissioner, Rehabilitation Services Administration, advised the Arbitration Panel that it was the opinion of the Secretary of Education that an arbitration panel cannot award a vendor back pay, attorneys fees, and costs. This same opinion was provided the Agency and by letter dated November 7, 1983, the Agency forwarded the opinion, as received by it, to members of the Arbitration Panel.[6]

---

[5] All were filed with the prior consent of the Arbitration Panel and the other party. The Petition to Supplement the Record and attached documents was in accordance with a committment by the Agency at the hearing that it would provide for the record the Application for Designation as the State licensing agency.

[6] All references to the Secretary of Education herein are to the Secretary of the U.S. Department of Education. The term "back pay" is borrowed from labor arbitration under collective bargaining agreements between companies and unions and although a blind vendor is not an employee of a state licensing agency, the term is frequently used in arbitrations, such as this arbitration, to identify earnings or income lost by a blind vendor because of some alleged violation of applicable law or regulations and is so used herein. The opinion by the Secretary of Education, and the reliance upon it by the Agency, require that the time for filing briefs fixed at the hearing in accordance with Paragraph 15.(a) of the Interim Rules be waived by the Arbitration panel in order to provide the parties an opportunity to file additional briefs concerning the opinion. However, in view of the Award and the reasons for it, the Arbitration Panel has not fixed a time for filing such additional briefs and is making an Award prior to that time required by Paragraph 15.(b) of the Interim Rules.

EVIDENCE

The evidence[7] shows that Mr. McNabb is a vendor who has operated a vending facility at Markham Towers East, Little Rock, Arkansas from September 1, 1969 to the present; that the relevant seniority of Mr. McNabb is his seniority date in the vending facilities program of the Agency which is December 27, 1960; that on September 4, 1980, the Agency notified Mr. McNabb and other vendors that vending facilities, identified as VF042, VF043 and VF079, at Southwestern Bell Telephone Company in Little Rock and North Little Rock, Arkansas were being opened for bids; that on September 12, 1980 Mr. McNabb applied for VF042, VF043 and VF079, indicating in accordance with instructions from the Agency that VF042 was his first choice, VF079 was his second choice, and VF043 was his third choice.

The evidence also shows that on September 20, 1980 the Transfer and Promotion Subcommittee of the State Committee of Blind Vendors met pursuant to Rule 10.3 of the Agency to make recommendations for assignment of vendors to VF042, VF043 and VF079;[8] that the Subcommittee recommended that VF042, the first choice of Mr. McNabb, be assigned to Mr. Melvin Morrison, a vendor having more relevant seniority than

---

[7] The Complaint involved in this arbitration is a First Amended complaint having a Certificate of Service dated January 21, 1983. There was no requirement for the Agency to answer the Complaint by admitting or denying the allegations thereon. However, at the pre-arbitration conference and with the understanding that the name of the Agency is no longer that used in the Complaint, the Agency admitted Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, and 16 and denied only the last sentence in Paragraphs 9, 11, and 15. The parties agreed that the exhibits attached to the Complaint are evidence in this arbitration. Thus, references to evidence herein include not only testimony and exhibits at the hearing, but also admitted allegations in the Complaint and exhibits attached thereto.

[8] The Rules of the Agency are Exhibit A attached to the Complaint.

Mr. McNabb, that VF043, the third choice of Mr. McNabb, be assigned to Ms. Christine Taylor, a vendor having less relevant seniority than Mr. McNabb, and that VF079, the second choice of Mr. McNabb, be assigned to Mr. James Spakes, a vendor having less relevant seniority than Mr. McNabb; and that subsequent to Mr. Louis H. Rives, Jr., the Administrator of the vending facilities program, reviewing the recommendations of the Subcommittee, Mr. Melvin Morrison was awarded VF042, Ms. Christine Taylor was awarded VF043 and Mr. James Spakes was awarded VF079.[9]

In addition, the evidence shows that even though the Administrator, Mr. Rives, was present throughout, and participated in, the deliberations of the Subcommittee with respect to the assigning of VF042, VF043, and VF079, the Subcommittee was not provided, and did not use, any objective basis for evaluating the qualifications of the applicants for these vending facilities in terms of the criteria, in addition to relevant seniority, for promotion and transfer in Rule 10.3 of the Agency; that Mr. McNabb was not a member of the State Committee of Blind Vendors from which the Subcommittee was drawn; that although Messrs. Morrison and Spakes were not members of the Subcommittee, they were members of the State Committee of Blind Vendors along with Ms. Taylor and other members of the Subcommittee; that Ms. Taylor was replaced on the Subcommittee by Ms. Nancy Wright during the deliberations of the Subcommittee on September 20, 1980 only when the Subcommittee considered VF043 for which the Subcommittee recommended Ms. Taylor even though she had less relevant seniority than Mr. McNabb; and that during the deliberations of the Subcommittee on September 20, 1980, the Subcommittee limited consideration of applicants for a vending facility to those ap-

[9] Mr. Rives is no longer with the Agency and was not a witness at the hearing.

plicants who had indicated that the vending facility was a first choice.[10]

Further, the evidence shows that during the deliberations of the Subcommittee involving VF043, the Subcommittee had for its consideration information indicating that Ms. Taylor had a history of poor customer and supplier relations and that Mr. McNabb had a problem with housekeeping and would have to improve in handling a cash drawer, information indicating that Mr. McNabb was qualified for VF043 and the other two vending facilities,[11] and a suggestion by at least one member of the Subcommittee that Ms. Taylor be awarded VF043 because of her age, because she was a woman, and because she had helped obtain the three vending facilities at Southwestern Bell Telephone; that the awarding of VF043 and VF079 to vendors having less relevant seniority than Mr. McNabb eventually resulted in Mr. McNabb requesting a full evidentiary hearing in accordance with Rule 13.2 of the Agency; that a full evidentiary hearing was held on January 8, 1981 before Presiding Officer

---

[10] There is an indication in the evidence that the Subcommittee may have given Mr. McNabb some consideration for VF043 even though it was his third choice. However, the testimony at the hearing shows that a motion was made and adopted by the Subcommittee to consider for a vending facility only vendors who had indicated that the vending facility was a first choice, the minutes of the Subcommittee deliberations on September 20, 1980 attached at Exhibit I to the Complaint show that the Subcommittee agreed to limit consideration for a vending facility to those vendors who had given a first preference for the vending facility, and the Agency admitted Paragraph 9 in the Complaint which includes an allegation that the Subcommittee limited its consideration as shown in Exhibit I.

[11] This information was provided by a memorandum from Mr. Jack W. Speir dated September 18, 1980 and the deposition of Mr. Speir supports this memorandum. The evidence shows that Mr. Speir was familiar not only with the qualifications of Mr. McNabb but also with the requirements of VF042, VF043, and VF079.

Vernon L. Glenn;[12] and that the February 11, 1981 recommendations of Presiding Officer Glenn have not been implemented by the Agency.

ISSUES

The issues upon which the parties agreed at the pre-arbitration conference and which are considered herein were substantially as follows:

> Was Mr. George McNabb denied vending facilities, identified as VF043 and VF079, by the Agency in accordance with applicable law and regulations. If not, what is the appropriate remedy.[13]

---

[12]The transcript of the full evidentiary hearing is Exhibit 0 attached to the Complaint and the recommendations of the Presiding Officer are Exhibit P attached to the Complaint.

[13] VF042 is not involved in these issues because it is the vending facility awarded to a vendor having more relevant seniority than Mr. McNabb and because Mr. McNabb does not allege that this vendor was not qualified for VF042 or was for some other reason not entitled to VF042 in accordance with Rule 10.3 of the Agency on the basis of relevant seniority. Other issues agreed upon by the parties at the pre-hearing conference were in substance: "Has the Agency implemented the recommendations made on February 11, 1981 by Presiding Officer Vernon L. Glenn after the full evidentiary hearing. If not, what remedy is directed." These other issues are the result of Presiding Officer Glenn recommending that the Agency provide Mr. McNabb with training to overcome alleged management or operational deficiencies and to insure that his full vocational potential is achieved and of the Complaint filed by Mr. McNabb alleging that the Agency has filed to provide Mr. McNabb with such training in violation of 34 C.F.R. 1369.11. Since the evidence does not show that Mr. McNabb required such training in order to be qualified for VF042, VF043, or VF079, there is no need for the Arbitration Panel to consider these other issues and direct such training. An issue with respect to the remedy which the Arbitrator panel has the authority to direct was also identified at the pre-arbitration conference and this issue is considered herein under an appropriate heading since it is embodied in the second issue considered herein.

CONTENTIONS OF THE PARTIES

As to the first issue identified above, it is a contention of Mr. McNabb that the evidence shows that he was denied VF043 and VF079 by the Agency in violation of Rules 10.2 and 10.3 of the Agency. As to the second issue identified above, the contentions of Mr. McNabb are that he is entitled to a priority assignment to the next available vending facility comparable to VF043 and VF079;[14] that he is entitled to backpay which makes him whole for income lost as a result of his not being awarded VF043 or VF079; and that he is entitled to those attorney fees and costs which he has had to incur because he was denied VF043 and VF079 by the Agency.

As to the first issue identified above, the contention of the Agency is that Rule 10.3 of the Agency required the final decision awarding VF043 and VF079 to be made by the Administrator and that whatever the evidence may show concerning the deliberations and recommendations of the Subcommittee, the evidence shows that the Administrator awarded VF043 and VF079 in accordance with Rules 10.2 and 10.3 of the Agency. As to the second issue identified above, the contention of the Agency is that insofar as Mr. McNabb requests backpay, attorneys fees, and costs as a remedy, the Eleventh Amendment of the U.S. Constitution denies this Arbitrator Panel the authority to grant a remedy.

---

[14] A priority assignment is described in the Complaint as an alternative to Mr. McNabb being placed in VF043 or VF079. However, the Agency correctly notes in its post-hearing brief that the vendors awarded VF043 and VF079 are not parties to this arbitration and although the Decision of an arbitration panel in *Albanese v. State of Delaware*, Case No. R-S/81-5, indicates that a Hearing Officer awarded a vendor a vending facility he was improperly denied which was not vacant, the attorney for Mr. McNabb did not show at the hearing or in her post-hearing brief that this Arbitration Panel has the authority to displace an incumbent vendor from VF043 or VF079.

DECISION

Insofar as the contention of Mr. McNabb with respect to the first issue identified above relates to VF043, there are several reasons that the Arbitration Panel must agree with this contention of Mr. McNabb, rather than that of the Agency with respect to the first issue identified above.[15] The first reason is that the Agency concedes that the Subcommittee had no right to limit consideration for VF042, VF043 or VF079 to those vendors who had indicated that the vending facility was a first choice.

The second reason is that the evidence described above includes substantial evidence which shows that the recommendation by the Subcommittee of Ms. Taylor for VF043 was on the basis of political, personal, and subjective criteria having no reasonable relationship to those criteria in Rule 10.3 of the Agency for determining the vendor to be transferred or promoted.[16]. The third reason is that the evidence described above includes substantial evidence which shows that if the Subcommittee at any time during its deliberations determined that Ms. Taylor was qualified for VF043 on the basis of an objective application of those criteria in Rule 10.3 of the Agency for determining the vendor to be transferred or promoted, it could have

---

[15] Paragraph 15, (c) of the Interim Rules provides for the decision of the Arbitration panel to contain a statement of the rationale, including findings of fact and conclusions of law, upon which it is based.

[16] The evidence supports the inference that the recommendation of Mr. Spakes for VF079 was on a similar basis. However, the first issue is in terms of both VF043 and VF079 and the contention of Mr. McNabb with respect to this issue is supported by substantial evidence showing a violation of applicable law and regulations as to either vending facility.

also determined on this basis that Mr. McNabb was qualified for VF043.[17]

The fourth reason is that the evidence described above includes no substantial evidence which shows that Mr. McNabb was not qualified for VF043 or VF079 on the basis of those criteria in Rule 10.3 of the Agency for determining the vendor to be transferred or promoted. The fifth reason is that the evidence described above includes substantial evidence which shows that the review of the recommendations of the Subcommittee by the Administrator was a review of recommendations which had been made by the Subcommittee as a result of deliberations in which the Administrator had participated.

The sixth reason is that the evidence described above includes no substantial evidence which shows that the review of the recommendations of the Subcommittee by the Administrator was other than an attempt to provide a basis for recommendations with which he had already agreed that would appear to be consistent with the criteria in Rule 10.3 of the Agency for deter-

[17] To this extent, relative qualifications of vendors are involved in this arbitration even though the parties agreed at the pre-arbitration conference that the Rules of the Agency do not require a vendor to be as well qualified as, or better qualified than, other applicants for a vending facility in order for the vendor to be assigned to the vending facility on the basis of relevant seniority.

mining the vendor to be transferred or promoted.[18]. Thus, for the foregoing reasons and since the Agency does not contend that the Subcommittee or the Administrator had the right to make recommendations for, or to award, VF042, VF043 and VF079 other than on the basis of those criteria in Rule 10.3 of the Agency, the Arbitration Panel concludes that both the recommendations by the Subcommittee and the review of these recommendations by the Administrator caused Mr. McNabb to be denied VF043 in violation of applicable law and regulations.

REMEDY

For the reasons indicated under the preceding heading, the Arbitration Panel will resolve the first issue identified above in the Award in accordance with the contention of Mr. McNabb with respect to this issue insofar as this contention relates to VF043. Accordingly, the Award must also be concerned with the second issue identified above relating to remedy.

Since the Agency acknowledges in its post-hearing brief that the Arbitration Panel has the authority to direct as a remedy that the Agency "place Mr. McNabb in a comparable vending facility, without bidding, as soon as one becomes available,"

---

[18] Evidence showing that the review by the Administrator was a de novo review of the qualifications of vendors for VF042, VF043, and VF079 is provided by a letter dated October 16, 1980 from Mr. Dick Seifert to an attorney for Mr. McNabb which is Exhibit L attached to the Complaint and by a Memorandum dated October 16, 1980 written by the Administrator which is Exhibit M attached to the Complaint. Since both of these documents show that they were written after it became known to the Agency that Mr. McNabb was dissatisfied with the awarding of VF042, VF043, and VF079, they are not persuasive evidence. Moreover, when considered with other evidence indicating that the Administrator may have told the Subcommittee that he wanted the best qualified applicants for VF042, VF043, and VF079, these documents show a desire on the part of the Administrator to hand pick the vendors awarded these vending facilities which was inconsistent with an objective evaluation by him of vendors on the basis of the criteria in Rule 10.3 of the Agency.

the Arbitration Panel will direct a remedy in the Award which gives Mr. McNabb a right to a new vending facility or a vacancy in an existing vending facility.[19] However, there are several reasons that such a remedy requires an interlocutory Award by the Arbitration Panel.

The first reason is that since the evidence shows that vending facilities differ significantly as to income potential, location, working conditions, and work requirements, an Award involving the remedy described above must be interlocutory to allow Mr. McNabb the opportunity to use, or not use, the right given him by such a remedy in connection with available new and existing vending facilities and to permit a final Award to take into consideration circumstances such as the availability of new vending facilities or vacancies in existing vending facilities and when they became available, a right of the Agency to deny Mr. McNabb a vending facility which he is unable to operate, and the manner and degree by which a vending facility in which Mr.

---

[19] The Agency also acknowledges that the Arbitration Panel has the authority to direct as a remedy that the Agency revise its transfer and promotion policies and in view of the political, personal, and subjective criteria used by the Subcommittee to make the recommendations of vendors involved in this arbitration, it was the unanimous opinion of the Arbitration Panel during its executive session following the hearing that the Panel should direct such a remedy. However, since it should now be apparent to the Agency as a result of this arbitration that procedures must be adopted to ensure fair and impartial consideration of vendors by the Subcommittee and review of recommendations of the Subcommittee by the Administrator which is independent of the deliberations of the Subcommittee, the Arbitration Panel will assume that the Agency will revise its transfer and promotion policies through negotiation with the Committee of Blind Vendors without having to be directed to do so by the Panel.

McNabb is placed differs from VF043.[20] The second reason is that what ever may be the authority of the Arbitration Panel to award back pay, attorneys fees, and costs to Mr. McNabb as additional relief in view of the contention of the Agency with respect to the second issue identified above and in view of the October 26, 1983 letter of the Commissioner, Rehabilitation Services Administration, representing that the right of a vendor to back pay, attorneys fees, and costs is being currently litigated in *Delaware v. United States Department of Education*, Civil Action No. 83-57 (D.Del.),[21] a final Award involving this or other additional relief to which Mr. McNabb may be entitled cannot be made by the Arbitration Panel until Mr. McNabb has used, or failed to use, a right to a new vending facility or a vacancy in an existing vending facility in accordance with an Award involving the remedy described above which is interlocutory and all of the results of this remedy are known.

---

[20] As with the remedy of back pay, the remedy of placing a vendor in an available vending facility is borrowed from labor arbitration under collective bargaining agreements between companies and unions and as a result, arbitration panels have limited the right of a vendor to a vending facility by requiring that the vending facility be comparable to the vending facility denied the vendor. However, in labor arbitration there are usually jobs which are identical or have an established relationship to each other and which result in "comparable" having a meaning it cannot have in this arbitration because each vending facility is somewhat unique. Thus, to limit Mr. McNabb to a "comparable" vending facility would make the Award vague and indefinite and could result in Mr. McNabb having to accept a vending facility for which he would not voluntarily submit a bid because of its location or some other circumstance that makes it different from VF043 even though it is arguably comparable to VF043.

[21] This October 26, 1983 letter not only concerned attorney fees which the Arbitration panel might direct the Agency to pay but also those attorney fees which the Department of Education represented it would pay in Paragraph 16. e. of the Interim Rules. Thus, the October 26, 1983 letter states a position of the Department of Education which would deny Mr. McNabb all relief for attorneys fees.

AWARD

It is the Award of the Arbitration Panel, as evidenced by the three attached Certificates of Award, that:

1. The Agency violated applicable law and regulations when it denied Mr. George McNabb a vending facility identified as VF043. Accordingly, the first issue agreed upon by the parties is resolved with the conclusion that Mr. George McNabb was not denied a vending facility, identified as VF043, by the Agency in accordance with applicable law and regulations.

2. Mr. McNabb shall have a continuing and unconditional right of assignment to the first vacancy in either of those vending facilities identified as VF043 and VF079. This right of assignment shall terminate only upon Mr. McNabb being assigned to VF043 or VF079 or upon a vacancy occurring in VF043 or VF079 and a refusal by Mr. McNabb to accept assignment to the vacancy.

3. For one calendar year following the date of this Award as indicated by the dates of the Certificates of Award attached hereto, Mr. McNabb shall have a continuing right of assignment to any new facility, and any vacancy in an existing facility other than VF043 or VF079, for which he submits an application. This right shall terminate during the one calendar year only when Mr. McNabb submits an application for a new facility or a vacancy in an existing facility, other than VF043 or VF079, and fails to accept assignment to the new facility or the vacancy in an existing facility, or when, and if, his right of assignment to VF043 or VF079 in accordance with Paragraph 2. above terminates during the calendar year.

4. The Agency shall have a right to deny Mr. McNabb a vending facility selected by him in accordance with that right described in Paragraph 3. only if Mr. McNabb would be unable to operate the vending facility, but any such denial by the Agency shall not cause Mr. McNabb to forfeit that right described in Paragraph 3. as to other vending facilities.

5. For thirty calendar days after a vacancy occurs in VF043 or VF079 during the one calendar year following the date of this Award as indicated by the Certificates of Award attached hereto, after Mr. McNabb is assigned a vending facility in accordance with that right described in Paragraph 3., after he is denied a vending facility by the Agency in accordance with Paragraph 4., or after the expiration of the one calendar year described in Paragraph 3., Mr. McNabb shall have the right to make a request for additional relief which:

a. shall be in writing and be sent by certified or registered mail, return receipt requested, to each member of the Arbitration Panel, to the Agency, and to the Department of Education;

b. shall describe any use by Mr. McNabb of that right described in Paragraph 2. or Paragraph 3. above and by the Agency of that right described in Paragraph 4. above;

c. shall state that an effort has been made by Mr. McNabb to reach an agreement with the Agency as to back pay, attorneys fees, and costs to be paid by the Agency;

d. shall state that an effort has been made by Mr. McNabb to reach an agreement with the Secretary of Education as to the attorney fees to be paid by the Secretary in accordance with Paragraph 16. (e) in the Interim Rules;

e. shall state the results of those efforts in Subparagraphs 5. c. and 5 d. above, the additional relief being sought by Mr. McNabb, and the basis for such additional relief; and

f. shall ask the Department of Education to issue purchase orders to members of the Arbitration Panel for their fees and expenses in connection with any further proceedings in this arbitration required because of the additional relief being sought by Mr. McNabb.

6. If a request for additional relief sent to a member of the Arbitration Panel in accordance with Paragraph 5. above is returned undelivered, or if a member of the Arbitration Panel is decreased or has stated in writing to the parties, prior to the request or upon receipt of the request, that he is unable or unwilling to serve, a new member of the Arbitration Panel shall immediately be named by the appropriate party if the member of the Arbitration Panel to be replaced was a party appointed member and a new Chairperson shall immediately be agreed upon by the parties, or selected by the parties alternately striking four names from a list of five arbitrators obtained by Mr. McNabb from the Federal Mediation and Conciliation Service, if the member of the Arbitration Panel to be replaced was the Chairperson.

7. In the event a member of the Arbitration Panel is replaced by a new member in accordance with Paragraph 6. above, Mr. McNabb shall provide the new member with the request described in Paragraph 5. above.

8. Within thirty calendar days after receiving a request by Mr. McNabb in accordance with Paragraph 5. above or after a member of the Arbitration Panel is replaced in accordance with Paragraph 6. above, which ever is later, the Agency shall make a response to the request by Mr. McNabb which:

> e. shall ask the Department of Education to issue any purchase orders identified in the request by Mr. McNabb in accordance with Subparagraph 5. f. above.

9. Upon making a request in accordance with Paragraph 5. above, Mr. McNabb shall be entitled to an order by the Arbitration Panel that will direct a hearing with respect to the additional relief being sought by Mr. McNabb at a time and place which will be determined by the Arbitration Panel after consulting with the parties and which as to time, will take into consideration the status of the litigation described in Subparagraph 8.c. above and the issuing of purchase orders to members of the Arbitration Panel by the Department of Education.

10. Upon Mr. McNabb failing to make a request in accordance with Paragraph 5. above, the final decision of the Arbitration Panel in accordance with Rule 15. (e) of the Interim Rules shall be that portion of this Award in this Paragraph 10. and in Paragraphs 1., 2., 3. and 4. above and that portion of this Award in Paragraphs 4. through 9. above shall be null and void.

CERTIFICATION OF AWARD

This is to certify that I do concur in the Award to which this Certificate is attached.

/s/ Harold D. Jones, Jr.
Chairperson

Annapolis, Maryland
December 29, 1983

CERTIFICATION OF AWARD

This is to certify that I do concur in the Award to which this Certificate is attached.

/s/ James Gashel, Arbitrator for the Grievant

Baltimore, Maryland
December 29, 1983

CERTIFICATION OF AWARD

This is to certify that I do concur in the Award to which this Certificate is attached.

/s/ Larry Dickerson, Arbitrator for the Agency

Little Rock, Arkansas
December 29, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2017

George McNabb,
Appellee

v.

United States Department of Education, and
William Bennett, Secretary of the
U.S. Department of Education,
Appellants

Arkansas Department of Human Services,
Division of Services for the Blind

No. 87-2078

George McNabb,
Appellee,

v.

United States Department of Education, and
William Bennett, Secretary of the U.S.
Department of Education,

Arkansas Department of Human Services,
Division of Services for the Blind,
Appellant.

Appeals from the United States District Court
for the Eastern District of Arkansas.

JUDGMENT

(Filed Feb. 27, 1989)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the district court's order to the Secretary of Education to reconvene the arbitration panel is affirmed, with the above-stated modification of the scope of the panel's authority to award damages in accordance with the opinion of this Court.

December 5, 1988

A true copy.

ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED: 2/24/89

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-2017
and 87-2078EA

George McNabb,
Appellant,

v.

United States Department of Education, et al.,
Appellees.

Appeals from the United States District Court
for the Eastern District of Arkansas.

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

February 17, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

§107. Operation of vending facilities

(a) Authorization

For the purpose of providing blind person with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

(b) Preferences regulations; justification for limitation on operation

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that—

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine

whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination, along with supporting documentation, in Federal Register.

§107a. Federal and State responsibilities

(a) Functions of Secretary; surveys; designation of State licensing agencies; qualifications for license; evaluation of programs

The Secretary of Education shall—

(1) Insure that the Rehabilitation Services Administration is the principal agency for carrying out this chapter; and the Commissioner shall, within one hundred and eighty days after enactment of the Randolph-Sheppard Act Amendments of 1974, establish requirements for the uniform application of this chapter by each State agency designated under paragraph (5) of this subsection, including appropriate accounting procedures, policies on the selection and establishment of new vending facilities, distribution of income to blind vendors, and the use and control of set-aside funds under section 107b(3) of this title;

(2) Through the Commissioner, make annual surveys of concession vending opportunities for blind persons on Federal and other property in the United States, particularly with respect to Federal property under the control of the General Services Administration, the Department of Defense, and the United States Postal Service;

(3) Make surveys throughout the United Stated of industries with a view to obtaining information that will assist blind persons to obtain employment;

(4) Make available to the public, and especially to persons and organizations engaged in work for the blind, information obtained as a result of such surveys;

(5) Designate as provided in section 107b of this title the State agency for the blind in each State, or in any State in which there is no such agency, some other public agency to issue licenses to blind persons who are citizens of the United States for the operating of vending facilities on Federal and other property in such State for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, as determined by State licensing agency, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State; and

(6) Through the Commission, (A) conduct periodic evaluations of the program authorized by this chapter, including upward mobility and other training required by section 107d-4 of this title, and annually submit to the appropriate committees of Congress a report based on such evaluations, and (B) take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in carrying out the provisions of this chapter.

(b) Duty of State licensing agencies to prefer blind

The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment. Each such license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not being operated in accordance with the rules and regulations prescribed by such licensing agency. Such licenses shall be issued only to applicants who are blind within the meaning of section 107e of this title.

(c) Selection of location and type of facility

The State licensing agency designated by the Secretary is authorized, with the approval of the head of the department or

agency in control of the maintenance, operation, and protection of the Federal property on which the facility is to be located but subject to regulations prescribed pursuant to section 107 of this title, to select a location for such facility and the type of facility to be provided.

(d) Buildings occupied by United States departments, agencies, and instrumentalities required to provide sites for facilities; exceptions

(1) After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is determined by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such building includes a satisfactory site or sites for a vending facility.

(2) The provisions of paragraph (1) shall not apply (A) when the Secretary and the State licensing agency determine that the number of people using the property is or will be insufficient to support a vending facility, or (B) to any privately owned building, any part of which is leased by any department, agency,

or instrumentality of the United States and in which, (i) prior to the execution of such lease, the lessor or any of his tenants had in operation a restaurant or other food facility in a part of the building not included in such lease, and (ii) the operation of such a vending facility by a blind person would be in proximate and substantial direct competition with such restaurant or other food facility except that each such department, agency, and instrumentality shall make every effort to lease property in privately owned buildings capable of accommodating a vending facility.

(3) For the purposes of this subsection, the term "satisfactory site" means an area determined by the Secretary to have sufficient space, electrical and plumbing outlets, and such other facilities as the Secretary may by regulation prescribe, for the location and operation of a vending facility by a blind person.

(e) State licensing agency in States having vocational rehabilitation plans

In any State having an approved plan for vocational rehabilitation pursuant to the Vocational Rehabilitation Act or the Rehabilitation Act of 1973[29 U.S.C. 701 et seq.], the State licensing agency designated under paragraph (5) of subsection (a) of this section shall be the State agency designated under section 101(a)(1)(A) of such Rehabilitation Act of 1973 [29 U.S.C. 721(a)(1)(A)].

§107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A state agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree—

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary:*Provided, however,* that such equipment and stock may be owned by the licensing agency for use of the blind, or by the blind individual to whom the license is issued: *And provided further,* that if ownership of such equipment is vested in the blind licensee, (A) the State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing;

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: *provided, however,* that in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a

reasonable amount which shall be determined by the Secretary;

(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

§107b-1. Access to information with State licensing agencies; election and responsibilities of Committee of Blind Vendors

In addition to other requirements imposed in this title and in this chapter upon State licensing agencies, such agencies shall—

(1) provide to each blind licensee access to all relevant financial reports, on the operation of the State vending facility program;

(2) conduct the biennial election of a Committee of Blind Vendors who shall be fully representative of all blind licensees in the State program, and

(3) insure that such committee's responsibilities include (A) participation, with the State agency, in major administrative decisions and policy and program development, (B) receiving grievances of blind licensees and serving as advocates for such licensees, (C) participation, with the State agency, in the development and administration of

a transfer and promotion system for blind licensees, (D) participation, with the State agency, in developing training and retraining programs, and (E) sponsorship, with the assistance of the State agency, of meetings and instructional conferences for blind licensees.

§107b-2. Omitted

§107b-3. Audit of nonappropriated fund activities

The Comptroller General is authorized to conduct regular and periodic audits of all nonappropriated fund activities which receive income from vending machines on Federal property, under such rules and regulations as he may prescribe. In the conduct of such audits he and his duly authorized representatives shall have access to any relevant books, documents, papers, accounts, and records of such activities as he deems necessary

§107c. Repealed. Pub. L. 93-516, title II, §205, Dec. 7, 1974, 88 Stat. 1626

§107d. Expenditures

(a) Personal services, rent, printing, etc.

The Secretary is authorized to make such expenditures out of any money appropriated therefor (including expenditures for personal services and rent at the seat of government and elsewhere, books of reference and periodicals, for printing and binding, and for traveling expenses) as he may deem necessary to carry out the provisions of this chapter.

(b) Preference to blind persons in employment

The Secretary shall, in employing such additional personnel as may be necessary, give preference to blind persons who are capable of discharging the required duties.

§107d-1. Grievances of blind licensees

(a) Hearing and arbitration

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Noncompliance by Federal departments ans agencies; complaints by State licensing agencies; arbitration

Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

§107d-2. Arbitration

(a) Notice and Hearing

Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in

accordance with the provisions of subchapter II of chapter 5 of title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5.

(b) Composition of panel; desigantion of chairman; termination of violations

(1) The arbitration panel convened by the Secretary to hear grievances of blind licensees shall be composed of three members appointed as floows:

(A) one individual designated by the State licensing agency;

(B) one individual designated by the blind licensee; and

(C) one individual, not employed by the State licensing agency or, where appropriate, its parent agency, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (1)(A), (B), or(C), the Secretary shall designate such member on behalf of such party.

(2)The arbitration panel convened by the Secretary to hear complaints filed by State licensing agency shall be composed of three members appointed as follows:

(A) one individual, designated by the State licensing agency;

(B) one individual, designated by the head of the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose; and

(C) one individual, not employed by the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose, who shall serve as

chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (2)(A), (B), or (C), the Secretary shall designate such member on behalf of such party. If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

(c) Publication of decisions in Federal Register

The decisions of a panel convened by the Secretary pursuant to this section shall be matters of record and shall be published in the Federal Register.

(d) Payment of costs by the Secretary

The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses he shall publish in the Federal Register.

§107d-3. Vending machine income

(a) Accural to blind licensee and alternatively to State agency; ceiling on amount for individual licensee

In accordance with the provisions of subsection (b) of this section, vending machine income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or,(2) in the event there is no blind licensee operating such facility on such property, to the State agency in whose State the Federal property is located, for the uses designated in subsection (c) of this section, except that with respect to income which ac-

crues under clause (1) of this subsection, the Commissioner may prescribe regulations imposing a ceiling on income from such vending machines for an individual blind licensee. In the event such a ceiling is imposed, no blind licensee shall receive less vending machine income under such ceiling than he was receiving on January 1, 1974. No limitation shall be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee. Any amounts received by a blind licensee that ate in excess of the amount permitted to accrue to him under any ceiling imposed by the Commissioner shall be disbursed to the appropriate State agency under clause (2) of this subsection and shall be used by such agency in accordance with subsection (c) of this section.

(b) Direct competition between vending machine and vending facility; proportion of accrued income from such vending machines for individual licensee

(1) After January 1, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section. "Direct competition" as used in this section means the existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have direct access to the blind vending facility shall not be considered in direct competition with the blind vending facility. After January 1, 1975, 50 per centum of all vending machine income from vending machines on Federal property which are not in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section, except that with respect to Federal property at which at least 50 per centum of the total hours worked on the premises occurs during periods other than normal working hours, 30 per centum of such income shall so accrue.

(2) The head of each department, agency, and instrumenatlity of the United States shall insure compliance with this section, with respect to buildings, installations, and facilities under his control, and shall be responsible for collection of, and accounting for, such vending machine income.

§ 107d-3

(c) Disposal of accrued vending machine income by State licensing agency

All vending machine income which accrues to a State licensing agency pursuant to subsection (a) of this section shall be used to establish retirement or pension plans, for health insurance contributions, and for provision of paid sick leave and vaction time for blind licensees in such State, subject to a vote of blind licensees as provided under section 107b(3)(E) of this title. Any vending machine income remaining after application of the first sentence of this subsection shall be used for the purposes specified in sections 107b(3)(A), (B), (C), and (D) of this title, and any assessment charged to blind licensees by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

(d) Income from vending machines in certain locations excepted

Subsections (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(e) Regulations establishing priority for operation of cafeterias

The Secretary, through the Commissioner, shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.

(f) Existing arrangements more favorable to blind licensees unaffected

This section shall not operate to preclude pre-existing or future arrangements, or regulations of departments, agencies, or instrumentalities of the United States, under which blind licensees (1) receive a greater percentage or amount of vending machine income than that specified in subsection (b)(1) of this section, or (2) receive vending machine income from individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(g) Regulations for compliance

The Secretary shall take such action and promulgate such regulations as he deems necessary to assure compliance with this section.

§ 107d-4. Training programs for maximum vocational potential for blind

The Commissioner shall insure, through promulgation of appropriate regulations, that uniform and effective training programs, including on-the-job training, are provided for blind individuals, through services under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.]. He shall further insure that State agencies provide programs for upward mobility (including further education and additional training or retraining for improved work opportunities) for all trainees under this chapter, and that

follow-along services are provided to such trainees to assure that their maximum vocational potential is achieved.

§ 107e. Definitions

As used in this chapter—

(1) "blind person" means a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than twenty degrees. In determining whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye, or by an optometrist, whichever the individual shall select;

(2) "Commissioner" means the Commissioner of the Rehabilitation Services Administration;

(3) "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States;

(4) "Secretary" means the Secretary of Education;

(5) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia;

(6) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia;

(7) "vending facility" means automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by

regulation prescribe as bening necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may be operated by blind licensees; and

(8) "vending machineincome" means receipts (other than those of a blind licensee) from vending machine operations on Federal property, after cost of goods sold (including reasonable service and maintenance costs), where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind licensee) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

Supreme Court, U.S.
FILED
AUG 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1866

In the Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE MCNABB, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
WILLIAM KANTER
JEFFRICA JENKINS LEE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether an arbitration panel, convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, to arbitrate a dispute between a blind vendor and a State, has authority to award retroactive money damages against the State.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985)	6
Delaware Department of Health & Social Services v. *United States Department of Education*, 772 F.2d 1123 (3d Cir. 1985)	3, 4, 7
Dellmuth v. *Muth*, 109 S. Ct. 2397 (1989)	6
Hans v. *Louisiana*, 134 U.S. 1 (1890)	6
Jagnandan v. *Giles*, 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977)	9
Parden v. *Terminal Railway*, 377 U.S. 184 (1964)	7
Pennsylvania v. *Union Gas Co.*, 109 S. Ct. 2273 (1989)	6, 7
Thomas v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985)	9
Welch v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987)	6, 8

Constitution and statutes:

U.S. Const.:	
Art. III	9
Amend. XI	3, 6, 8, 9
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	9
Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*	2
20 U.S.C. 107d-1(a)	2
20 U.S.C. 107d-2(a)	2, 3, 9
20 U.S.C. 107d-2(d)	3

Statutes – Continued: Page

Randolph-Sheppard Act Amendments of 1974, Pub. L. No. 93-651, § 206, 89 Stat. 2-11 2

Miscellaneous:

S. Rep. No. 937, 93d Cong., 2d Sess. (1974) 9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1866

GEORGE MCNABB, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY OF EDUCATION, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSTION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 862 F.2d 681. The order of the district court (Pet. App. A14-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1989. A petition for rehearing was denied on February 17, 1989 (Pet. App. A41). The petition for a writ of certiorari was filed on May 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

BEST AVAILABLE COPY

STATEMENT

1. This case arises under the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, which establishes a cooperative federal-state scheme for licensing, training, and placing qualified blind persons in vending facilities on federal, state, and other property. The Secretary of Education administers the Act, and state agencies approved by the Secretary license and train vendors and select facilities. Section 107d-1(a), added by the 1974 amendments to the Act (Pub. L. No. 893-651, Title II, § 206, 89 Stat. 2-11), provides that any blind vendor who is dissatisfied with the action of a state agency "may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute." 20 U.S.C. 107d-1(a). The arbitration decision is subject to judicial review. 20 U.S.C. 107d-2(a).

Petitioner is a blind person who has been licensed by respondent Arkansas Department of Human Services, Division of Services for the Blind, the agency responsible for administering the Randolph-Sheppard Act in Arkansas. In April 1981 petitioner filed a complaint with the Secretary pursuant to Section 107d-1(a) requesting that an arbitration panel be convened. He complained that two vending facilities for which he had bid, and which were more profitable than the facility he was operating, had been awarded to vendors with less seniority, in violation of applicable regulations.[1]

After being advised by the Department of Education that a panel would be convened, petitioner amended his complaint to seek "back pay" (the difference between his profits and those of the facilities for which he had bid) and attorney's fees. Thereafter, the Department informed peti-

---

[1] As required by the Act (20 U.S.C. 107d-1(a)), petitioner had first requested, and was granted, a full evidentiary hearing by the state agency, which upheld the denial of the vending stands to petitioner.

BEST AVAI

tioner and the panel of its position that an arbitration award of retroactive money damages and attorney's fees against a State were contrary to the Act and violated the principle of sovereign immunity embodied in the Eleventh Amendment. It also advised the parties of its view that Section 107d-2(d) does not authorize the Secretary to pay attorney's fees as part of the "reasonable costs of arbitration."

The arbitration panel found that the state agency had improperly failed to select petitioner for the two vending facilities. As relief, the panel awarded petitioner preferential consideration for future vending facilities, but declined to rule on his request for back pay and attorney's fees. The panel also provided that, following petitioner's acceptance or refusal of a future vending facility, he could request that the panel be reconvened for the purpose of hearing his claim for additional relief. Pet. App. A29-A35.

After accepting an assignment to a new vending facility in 1985, petitioner requested that the arbitration panel be reconvened to consider his claims for compensatory damages and attorney's fees. The Department of Education advised petitioner that, in accordance with its previously stated position, the arbitration panel would not be reconvened.

2. Petitioner then filed this action challenging the decision not to reconvene the arbitration panel. The district court (Pet. App. A18-A19) granted summary judgment in favor of petitioner, basing its decision on *Delaware Department of Health & Social Services* v. *United States Department of Education*, 772 F.2d 1123 (3d Cir. 1985). In that case, a blind vendor licensed by the State of Delaware to participate in the Randolph-Sheppard Act program had appealed from a district court's judgment

ABLE COPY

vacating an arbitration panel's award of back pay and attorney's fees. The court of appeals reversed, reasoning that by creating an arbitration remedy in the Act, Congress meant to incorporate the powers generally available to arbitrators in other contexts, including the authority to award "retrospective compensatory relief in appropriate cases." *Id.* at 1136. The court held that Delaware had waived its sovereign immunity by its participation in the Randolph-Sheppard Act program. *Id.* at 1137-1138.

Adopting the rationale of the Third Circuit's decision, the district court found that "an arbitration panel convened pursuant to the Randolph-Sheppard Act *does* have the authority to award compensatory relief and attorney's fees.' Pet. App. A19. Accordingly, the district court directed the Secretary "to reconvene an arbitration panel to consider the award of compensatory relief, attorney's fees and costs to [petitioner]." *Ibid.*

3. In a per curiam decision from which each judge wrote a separate opinion concurring and dissenting, the court of appeals affirmed the district court's order to the Secretary to reconvene the arbitration panel. However, the court of appeals held that the panel could award prospective damages only, *i.e.*, from the date of the panel's decision (December 29, 1983) to the date petitioner accepted assignment to a new vending facility (October 10, 1985). The court left to the arbitration panel initial consideration of the attorney's fees issue. Pet. App. A5.

Chief Judge Lay, in his separate opinion, stated that "the Act authorizes arbitration panels to assess compensatory damage awards against state agencies and that Congress had abrogated sovereign immunity for states which participate in the blind vendor program." Pet. App. A5-A6. He surmised that Congress, in adopting arbitration, must have contemplated that States would be subject

BEST AVAILABLE COPY

to all the remedies traditionally available in arbitration proceedings, including the award of retrospective monetary relief. *Id.* at A8-A9. On the other hand, Judge Fagg took the position that the Act's silence with respect to the remedial powers of an arbitration panel precluded a finding that Congress conditioned the State's participation in the blind licensee program on their accepting responsibility for the payment of money "later deemed appropriate to make the wronged licensee whole." *Id.* at A9-A10. Thus, Judge Fagg would have held that the Act does not authorize *any* awards of money damages against the States. *Id.* at A12. Judge Doty, whose opinion provided the basis for the per curiam order with respect to damages, concluded that "[w]hen the Act is viewed against the backdrop of the Eleventh Amendment, it is seen that Congress only intended that the arbitration panel * * * have the necessary implied powers to grant prospective relief, and did not intend to abrogate the state's rights under the Constitution." *Id.* at A13.[2]

ARGUMENT

1. The court of appeals' holding that a Randolph-Sheppard Act arbitration panel may not award retroactive money damages is correct. Nothing in the language of the Act expresses with sufficient clarity any intent to abrogate the sovereign immunity of the States. Nor is there a basis for finding a waiver of that immunity on the part of the States themselves.

[2] Judge Doty dissented from the decision of the other two judges that the question whether attorney's fees should be awarded should be decided in the first instance by the arbitration panel. Pet. App. A9 (opinion of Lay, J.); *id.* at A12 (opinion of Fagg, J.). He would have held that panels may order recovery of attorney's fees. *Id.* at A13 (opinion of Doty, J.). Petitioner does not challenge the court's resolution of that issue, and neither do we.

In several recent cases, this Court has stressed the stringency of the standard to be applied in determining whether Congress has abrogated the sovereign immunity of the States under the Eleventh Amendment.[3] In *Dellmuth* v. *Muth,* 109 S. Ct. 2397, 2401 (1989), the Court held that "in this area of the law, evidence of congressional intent must be both unequivocal and textual." Similarly, in *Pennsylvania* v. *Union Gas Co.,* 109 S. Ct. 2273, 2277 (1989) (opinion of Brennan, J.) (citing *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985)), the Court recognized that when Congress abrogates the States' constitutionally secured immunity "it must make its intent to do so 'unmistakably clear.' " And the Court has imposed a similarly stringent standard for determining that state sovereign immunity has been waived. As stated in *Welch* v. *Texas Department of Highways & Public Transportation,* 483 U.S. 468, 473 (1987) (opinion of Powell, J.) (citations omitted), "because '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights,' the Court will find a waiver by the State 'only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' "

Judged by these standards, the Randolph-Sheppard Act does not authorize awards of retroactive money damages with sufficient clarity to justify a finding that state sovereign immunity has been abrogated or waived. The Act nowhere mentions money damages. Rather, it merely

---

[3] The Amendment prohibits the extension of "the [j]udicial power of the United States * * * to any suit in law or equity" against a state by citizens of another state or a foreign state. U.S. Const. Amend. XI. This Court long ago held that an unconsenting state also is immune from suits brought by one of its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1, 21 (1890).

authorizes arbitration. While it is true that labor arbitrators frequently make awards of retroactive money damages, that fact is an insufficient premise for a finding of legislative abrogation in light of this Court's insistence on a clear statement in the language of the statute itself before retroactive damages may be awarded against a State. In *Dellmuth*, this Court recognized that the "statutory structure [of the Education of the Handicapped Act] lends force to the inference that the States were intended to be subject to damages actions." 109 S. Ct. at 2402. However, the Court held: "[S]uch a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which * * * is necessary before we will determine that Congress intended to exercise its powers of abrogation." *Ibid.* And a finding of waiver by the States is similarly precluded. A "state's informed choice to accept an obligation to pay money damages cannot rest on an implied statutory authorization" (Pet. App. A11 (opinion of Fagg, J.)), and "Congress did not make it unambiguous that the state's participation in the blind vendors program would result in a waiver of its sovereign immunity or condition its participation on accepting all forms of monetary relief, including retroactive damages" (*id.* at A13 (opinion of Doty, J.)).

The Third Circuit reached a contrary conclusion in *Delaware Department of Health and Social Services*, and petitioner primarily contends (Pet. 8-10) that review is warranted on account of the disagreement between the decision below and the decision in that case. However, *Delaware Department of Health and Social Services* was decided prior to this Court's decisions in *Dellmuth, Union Gas*, and *Welch*. Moreover, the Third Circuit relied upon *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964), in reaching its decision (see 772 F.2d at 1137-1138), and this

Court overruled *Parden* in *Welch*. 483 U.S. at 478 (opinion of Powell, J.), 496 (opinion of Scalia, J.). Thus, "the legal underpinnings of that case [*Delaware Department of Health and Social Services*] have been fatally eroded." Pet. App. A13 (opinion of Doty, J.). The Third Circuit should be allowed to reconsider the question in light of this Court's recent decisions before review by this Court is warranted.

2. a. Review is not warranted to consider petitioner's contention, made only in passing (Pet. 12-13), that the Eleventh Amendment has no relevance to this case because the Randolph-Sheppard Act authorizes arbitration rather than a court action.[4] Regardless of whether the Eleventh Amendment directly governs the arbitration proceedings in this case, the decision below is correct. For, in determining whether state sovereign immunity from retrospective damage awards has been abrogated or waived, the stringent standards applicable to federal judicial proceedings should apply to federal arbitration proceedings as well.

The principles of federalism and of respect for state sovereignty that underlie the Eleventh Amendment apply with equal force to federally convened arbitration panels because, just like a district court, a panel convened to resolve a dispute with a State through the application of federal law and regulations is a federal adjudicative instrumentality. Since those principles afford protection against "federal judgments requiring payment of money that would interfere with the State's fiscal autonomy and

---

[4] No court has decided this question in petitioner's favor. Judge Lay assumed "for the purposes of argument * * * that an enforcement proceeding in federal courts of an arbitration award against the state would violate the eleventh amendment." Pet. App. A8 n.2. Similarly, the Third Circuit assumed, without deciding, that the Amendment applies in this context. 772 F.2d at 1138.

thus its political sovereignty" (*Jagnandan* v. *Giles,* 538 F.2d 1166, 1176 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977)), they are fully applicable in the present case.[5]

Moreover, under the Act, an arbitration panel's decision is "subject to appeal and review as a final agency action for purposes of [the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*]." 20 U.S.C. 107d-2(a). Thus, if an arbitration panel awarded relief in the form of back pay and judicial review was sought, it would fall upon a federal court to decide whether or not to enforce the award. In such a suit, the court would be asked to do that which it is powerless to do under the Eleventh Amendment, *i.e.*, award compensation against a State for past wrongs.

b. Finally, review is not warranted to consider petitioner's related argument (Pet. 11) that the court of appeals' decision "impedes effectuation of the policies Congress sought to promote when it amended the Randolph-Sheppard Act to provide for arbitration." The major goals of the 1974 amendments were to strengthen the program through a greater commitment to the placement of blind vendors on federal facilties and to halt the erosion of the vendors' economic well-being caused by increased competition with vending machines, federal employee controlled vending operations, and minority business concerns. S. Rep. No. 937, 93d Cong., 2d Sess. 10-11 (1974). An arbitration panel whose authority is limited to prospective relief has broad power to issue

---

[5] The cases relied upon by petitioner (Pet. 12) do not command a different result since they merely stand for the proposition that Congress has the power to provide for arbitration as an alternative dispute-resolution forum without contravening the powers of Article III courts. *E.g.*, *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 571 (1985). Moreover, none of those cases involved a dispute between a citizen and a State and thus the Eleventh Amendment and principles of sovereign immunity were not implicated.

orders—such as an order to cease and desist, to take corrective action, or to give preferential treatment in the future—in furtherance of those goals. Thus, the statutory scheme can function effectively, and the purposes of the statute can be fully served, if arbitration panels resolve disputes between blind vendors and the States through prospective decrees. See Pet. App. A13 (opinion of Doty, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
WILLIAM KANTER
JEFFRICA JENKINS LEE
Attorneys

AUGUST 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00378